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PRECEDENTS

OF

INDICTMENTS.

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C. J. Forbes.

OF

INDICTMENTS;

TO WHICH IS PREFIXED

A CONCISE TREATISE

UPON THE

OFFICE AND DUTY OF GRAND JURORS

By DANIEL DAVIS,

SOLICITOR GENERAL OF MASSACHUSETTS.

BOSTON:

CARTER, HENDEE, AND BABCOCK.

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PREFATORY REMARKS.

The following volume is intended to furnish a more extensive and complete collection of precedents of indictments, than has hitherto been contained in any *one work* upon that subject; and to reduce them to as great a degree of conciseness and simplicity as may be consistent with their correctness and validity. In the forms herein contained, the obsolete language; the ancient but unnecessary technical phrases; and the superfluous prefatory allegations and averments, which are still retained in the English and American collections, have been rejected. There is no reason why they should continue to lengthen and incumber the records of the judicial courts. It seems singular, that the best and most modern compilers of these precedents, should retain allegations and averments, so long since exploded; and, at the same time, carefully note the authorities by which they have been decided to be unnecessary and superfluous.

In rejecting this unnecessary and superfluous matter, care has been taken to refer to the authorities upon which the improvement has been adopted. It will be found, therefore, that by pursuing this course, the precedents in this collection are more concise and simple, than those heretofore in use. Yet it is presumed, that every thing has been retained which can be necessary to their validity. There is no better reason for retaining the obsolete, and, in some instances, it may be said, the exploded language found in the ancient forms in criminal processes, than there would be in retaining the costume of the age in which it was

first adopted. After the highly important example of the British government in improving the criminal code of that nation, by abolishing some of the most shocking principles and rules of their ancient common law relative to certain crimes and offences, it would be particularly proper and appropriate, to abolish the strange, and, in some instances, the *sneer-exciting* language in the forms of process used for enforcing them.

It has been suggested, and it may probably be true, that there is no work, either in England or America, which contains a complete collection of precedents of indictments. Chitty's collection is extensive and valuable; but the work which contains it, is voluminous and expensive; a great proportion of which is made up of English statutes, and precedents founded upon them, which have no force or operation in our country. The collections in Starkie and other modern compilers, are evidently incomplete. The same may be said of Tremaine, and of the collections in the Crown Circuit Companion, and Crown Circuit Assistant. Mr. Wentworth's work may be considered an exception to the above remark. But its immense size, and the *appalling* length of his forms and precedents, render the use of it inconvenient and laborious.

It is anxiously hoped, that this undertaking will meet the approbation of the profession. Many of the precedents were drawn by the author, and are original with him. Most of these have been drawn in cases which have occurred in the course of his official duty; and have been sanctioned by the courts before which they were returned.

The book might have been increased to double its size, if the course relative to the prolixity of the forms in other similar collections had been pursued. It is a fact, that the forms in most of the English precedents have been substantially, and it may be said, verbally, the same for several centuries, without alteration or

improvement; and have been thus transcribed and transferred from one book of precedents to another, down to the latest publications upon the subject. They are, moreover, loaded with numerous counts, apparently varying from each other in nothing material; and of course protracting the precedents to an unnecessary and unreasonable length. This inconvenience, not to say reproach upon the forms of proceeding in criminal prosecutions, has been avoided in the following work; which is the result of thirty years' uninterrupted official experience, acquired under the advice and correction of distinguished judges and professional friends during that period.

The law relative to the duty of Grand Juries, particularly as to the mode of conducting public prosecutions before them, requires to be explained and better understood. This mode is somewhat different in different States; that which is stated in the following concise remarks, particularly as it respects the duty, rights, and manner of conducting the examinations by the public prosecutor before the Grand Jury, is the same that the author has pursued during the whole period of his official intercourse with them; and in reference to the laws and usages of the State wherein the duties of the office have been discharged, have been found not only to be liable to no objections, but to contribute greatly to the despatch of the public business. The concise remarks and explanations upon this and the other subjects prefixed to the precedents in this volume, it is hoped may not be without their use.

*** The quotations in the following work, from *Chitt. Cr. L.* are from Ryley's Edition. The references to the pages are according to the English Edition, which are preserved in that work.

The quotations from *Starkie's Cr. Pl.* are from the London Edition of 1814.

A

CONCISE TREATISE

UPON THE

OFFICE AND DUTY OF GRAND JURORS.

THE institution of grand jurors is one of the most ancient which we derive from our English ancestors. It is known to have existed for nearly a thousand years; for we find that so anciently as the reigns of Ethelred and Richard the First, the mode of electing the grand jury was altered and regulated.[1]

The institution, therefore, must have existed prior to the reigns of those monarchs; the former of which commenced in the year eight hundred and sixty-six.[2]

A statement of the history of grand juries, in the time of Bracton, is given 3 Reeves' H. E. L. 133. In the time of Bracton, in the reign of Henry the Third, the presentment of offences was by a grand jury of twelve, returned from every hundred in the county. But that practice had now received some alteration; for towards the close of this reign, at a commission of *oyer and terminer*, besides the return of an inquest for every hundred by the bailiff, the sheriff also returned a panel of knights, which were called the *Grand Inquest*. The

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[1] 1 Chitt. 306; Co. Litt. 115 b; 4 Bl. Com. 302; Wilk. Leges Angl. Sax. 117.

[2] He was brother to Alfred the Great, and was killed in the year eight hundred and seventy-one.

inquests for the hundreds still made their presentments, as in Bracton's time; and also, no doubt, found indictments. But these were confined to their different hundreds. The grand inquest was to inquire for every hundred in the county; and if a commission of assize and *nisi prius* were sitting, they filled the places of jurors in civil cases.

When the practice began of returning a grand inquest to inquire for the whole body of the county, the business of the hundred inquest must naturally decline; till, at length, the whole burden of presenting and finding indictments devolved upon the Grand Inquest, and the hundred continued to be summoned merely for trying issues.

There can be no institution, designed to co-operate with the judicial powers in the detection and punishment of crimes, more perfect than that of grand juries. It is one of their most important duties, however, to protect the innocent against the groundless and malicious accusations which are too frequent in a government where any person may obtain and pursue a public prosecution at the expense of the state.

The character and respectability of this institution may depend in some degree upon the mode in which its members are selected. This mode is different in the country of our English ancestors, from what it is in New England. The municipal institutions in the two countries may account for this difference. In England, the grand jury are selected and returned by the sheriff of the county. In our country, they are selected by lot, from a body of the most respectable citizens in the several towns in the county, whose names are kept in a box, which is called "the jury box," and from which the grand jurors are drawn. The statutes prescribe their qualifications, and the manner in which they shall be selected. Long experience and observation upon the subject authorize the assertion, that this mode of constituting the grand jury is unexceptionable.

The mode of making this selection in England, above alluded to, has heretofore been as follows.[1] A precept issues either in

[1] 1 Chitt. 310; 2 Hale, 153–4; Bac. Abr. *Juries, A. B.*

the name of the king, or of two or more justices, directed to the sheriff; upon which he is to return the number required out of the whole county; that is, a sufficient number from every hundred, from which the grand jury is selected.[1] By this mode, the grand jury is composed of members selected and returned, at the will and pleasure of an individual officer of the government.

This is a power liable to abuse and evasion, and was the subject of complaint and parliamentary interference as long ago as the reign of Henry the Fourth.[2] It appears by the preamble to the statute of the 11th of Henry the Fourth (420 years ago), that "of late, inquests were taken of persons named to the justices, *without due notice to the sheriff;* of which persons some were *outlawed;* some fled to the sanctuary for *treason*, and some for *felony*, by which many persons were indicted who were not guilty, by *conspiracy*, abetment, and false imaginations of other persons, for their special advantage, and *singular lucre*."

The selection of a grand jury, by a single officer of the government, cannot be the best or safest mode. If the possibility of evasion or prostitution of duty may be supposed to exist, the means, which an unprincipled citizen can employ to effect his object, may be resorted to with greater facility where one person only possesses all the power to act, than can possibly exist in the mode of selecting the grand jury in the New England States.

From long experience and observation it may be safely asserted, that no body of men, designated to exercise important powers and functions connected with the judicial department of our government, have been more respected, or concerning whom the public opinion has uniformly been more favorable, than the grand jurors, selected and organized according to the laws and usages of our happy country.

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[1] By a late statute of 6 Geo. 4, c. 59, the laws of England, relative to the qualifications and appointment of jurors, have been revised. — See Collier's Analysis.

[2] 2 Hawk. c. 25, § 23.

In the following remarks upon the Office and Duty of Grand Jurors, I shall state,

First. Their number and qualifications, as required by law.

Secondly. The mode of selecting and summoning them.

Thirdly. The course of proceeding after their appearance in court. Their oath; its nature and obligations.

Fourthly. The right of challenging grand jurors, and the right of the court to instruct them as to the principles of evidence.

Fifthly. The mode of proceeding, after the grand jury are organized.

Sixthly. The nature of the evidence to be submitted to them, and the principles and grounds upon which it is to be received and decided upon by them.

Seventhly. The right of the grand jury to compel the attendance of witnesses. The finding of the bills, &c.

Eighthly. The amendment of indictments by the order of court, and the consent of the grand jury.

First. Their number and qualifications, as required by law.

The grand jury must consist of twelve at least; and may contain any greater number, not exceeding twenty-three.

There must be twelve at least; because no bill of indictment can be found, unless by the concurrence of that number. And there must not be more than twenty-three; otherwise there might be an equal division, and two full juries might disagree in opinion.[1]

It is clearly settled, that by the common law, all persons serving upon the grand inquest, "must be good and lawful men"; by which it is intended, that they must be citizens of the state in which their duties are discharged.[2] And it is also settled, that no person who has been convicted of an infamous crime, such as

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[1] 1 Chitt. 306, 311; 2 Hale, 151; Hawk. b. 2, c. 25, § 16; Bac. Abr. *Juries, A;* 4 Bl. Com. 302.

[2] 2 Hale, 155; 2 Hawk. c. 25, § 16; Bac. Abr. *Juries, A; Indictment, C;* 1 Chitt. 307, and other authorities there cited.

perjury, forgery, conspiracy, &c. can be permitted to serve on the grand jury. And if a man thus disqualified be returned, he may be challenged by the party accused, before the bill is presented; or if it be discovered afterwards, he may plead it in avoidance, on producing the record of conviction on which the disqualification is founded.[1] But this objection ought to be made by the party before his trial; otherwise it may be doubtful whether he can be permitted to do it afterwards, unless it can be verified by the records of the same court in which the indictment may be pending.[2] It is also necessary, at common law, (and doubtless by the statutes under which the grand jury are summoned,) that the persons composing the grand jury should be inhabitants of the county for which they are returned to serve.[3]

The foregoing remarks upon this point are founded upon English authorities. But the question has been settled in the case of *Commonwealth* v. *Smith*, 9 Mass. R. 110. The words of *Sewall* J., who delivered the opinion of the court in that case, are, "Objections to the personal qualifications of jurors, on the legality of the returns, are to be made before the indictment is found; and may be received from any person who is under a presentment for any offence whatever, or from any person present who may make the suggestion, as *amicus curiæ*." In a subsequent case, however, of *Commonwealth* v. *Parker et al.* 2 Pick. 568, Chief Justice *Parker* suggests a doubt, whether it would be safe to adopt the above remarks of the court in Smith's case, in their full extent. His words are, "We have some doubts as to the correctness of them in all cases; and the case in which they were made, was determined upon another point."

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[1] See the authorities next above quoted.

[2] Hawk. b. 2, c. 25, § 27; Bac. Abr. *Juries, A*; 1 Chitt. 307-8; See also Gord. Dig. p. 730. — There seems to be no reason why a conviction, in any court having jurisdiction, should not be considered as a disqualification, as well as that in which the indictment may be pending.

[3] Hawk. b. 2, c. 25, § 16.

The qualifications of grand jurors, as they respect their property, character, and residence, are, in the United States, as in England, regulated by particular statutes. In a concise treatise of this kind it would be inconvenient to insert the statute provisions of the several States upon this subject. They can be referred to by all who have occasion to know them. Those, however, of the state of Massachusetts, and of the United States, and several decisions upon this subject in the courts of the United States, will be referred to and stated.

By the statute of Massachusetts of 1812, ch. 141, § 2, the qualifications of jurors are pointed out. It is therein enacted, "that the selectmen in each town or district in this commonwealth shall provide, and at all times cause to be kept, in their respective towns, one jury box; and shall, once at least in three years afterwards, prepare a list of such persons, under the age of seventy years, in their respective towns, as they shall judge well qualified to serve as jurors; *being persons of good moral character, and qualified as the constitution directs, to vote in the choice of Representatives*." By the constitution of Massachusetts, chap. 1, sect. 3, art. 4, "Every male person, being twenty-one years of age, and resident in any particular town in this Commonwealth, having a freehold estate within the same town of the annual income of three pounds, or any estate of the value of sixty pounds," had a right to vote in the choice of Representatives for said town. But by the third article of the Amendments of the constitution, these qualifications are altered, and others substituted. This article in the Amendments is as follows.

"Every male citizen of twenty-one years of age and upwards, (excepting paupers, and persons under guardianship,) who shall have resided within the Commonwealth one year, and in the town or district, in which he may claim a right to vote, six calendar months next preceding any election of Governor &c. or Representatives, or who shall have paid by himself, or his parent, master, or *guardian*,[1] any state or county tax, which shall, with-

[1] There is a singular discrepancy in the wording of this article, in the case of persons under guardianship. In the former part of it, persons under guardian-

in two years next preceding such election, have been assessed upon him, in any town or district of this Commonwealth; and also every citizen, who shall be by law exempted from taxation, and who shall be in all other respects qualified as above mentioned, shall have a right to vote in such election of Governor &c. and Representatives; and no other person shall be entitled to vote in such elections."

The qualifications of jurors, as they respect property, character, and residence, are fully pointed out by the above references to the laws and constitution of Massachusetts.

In the case of *United States* v. *Burr*, i. 37, it was decided, that where the state law fixes the number of grand jurors, the Circuit Court is governed thereby; and that if there are deficiences on the panel, they must be supplied by the by-standers. By this decision it is understood, that the right to return jurors, *de talibus circumstantibus*, may be extended to grand jurors. But this does not appear to be authorized by the act of the United States of September 24, 1789. The direction to return jurors *de talibus circumstantibus*, there contained, refers to the trial, by a traverse jury, "of civil and criminal causes."[1] It may be doubted whether any court can exercise the power of ordering grand jurors to be returned from the "by-standers," without legislative authority for that purpose. In several States, this power is expressly given in the statutes regulating the mode of selection and summoning the grand jury. But it cannot be exercised in those States where the power is not thus given.

Secondly. The mode of selecting and summoning grand jurors.

The mode of selecting and summoning grand jurors is regulated in the several States, by statutes for that purpose; and in the tribunals of the United States, by the act of Congress establishing the judicial courts. The most usual mode of selection is

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ship are expressly excepted from the right of voting. In the part here extracted, any person who shall have paid, by himself or *his guardian*, any state tax &c., shall have a right to vote. The appointment of a guardian presupposes, in all cases, either minority or some other disqualification.

[1] See Gordon's Digest, Art. 956, p. 143.

by lot. In Massachusetts they were formerly chosen in the same manner that other town officers were; and the same persons were usually selected for a succession of years.

The common law authorities, and British statutes upon this subject, have little applicability in this country.[1] The usage in England has varied in different counties; in some of which, two full grand juries are summoned for the same court. This mode of summoning double the number necessary, and then selecting the panel from that number, is entirely repugnant to all our theory and practice in regard to the institution of grand jurors.[2]

The mode of selecting and summoning grand juries in Massachusetts is provided for in the statutes of 1807, ch. 140, and 1812, ch. 141, to which the reader is referred.

By the act of Congress of September 24, 1789, § 29, the mode of designating juries is provided for, which act, so far as it relates to this subject, may be found in Gordon's Digest,[3] to which the reader is also referred.[4]

Thirdly. The course of proceeding after their appearance in court. Their oath; its nature and obligations.

The course of proceeding at the opening of the courts in this country is substantially the same as that at the assizes in England, with the exception of reading the commission of assize, oyer and terminer, and nisi prius.[5] Proclamation is made for those persons who are returned to serve on the grand inquest for the body of the county, to answer to their names; and if it appear that a sufficient number are present to constitute a grand jury, the oath, prescribed by law to be taken by the grand jury, is administered by the clerk of the court, in the presence and by

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[1] 1 Chitt. 310, 311. See ante, p. 2, where the mode of summoning the Grand Jury in England is stated. Bac. Abr. *Juries, A.*

[2] See Collier's Analysis of the Criminal Statutes of England, containing a late statute of 6 Geo. 4, c. 59, in which all the laws of England, relative to the qualifications and appointment of jurors, have been revised and condensed.

[3] Gord. Dig. Art. 955. p. 143.

[4] See Collier's Analysis, *ubi supra.*

[5] 1 Chitt. 313, 314, and the authorities there cited.

order of the court; previous to which the clerk prepares alphabetical lists, from the returns on the *venires* of the names of the persons returned as grand jurors. The court then cause the two persons who stand first on this list, to be called and sworn; and after this, the others in succession, as they are named in the list, in such divisions as have been usual, or as by the court may be deemed proper. The oath is then administered, in the form prescribed by the statute,[1] to which the reader is referred, and which will be particularly referred to hereafter.

The charge to the grand jury is now given by the court;[2] whereupon they retire, under the care and charge of one or more officers of the court, to be organized as the statute directs, and to discharge the duties of their office. They first elect a foreman, by ballot, and notify the court, by the officer appointed to attend them, of the person thus elected, whose name is to be recorded as such foreman by the clerk of the court. The foreman of each grand jury is expressly authorized, by the statute of Massachusetts before quoted, in the presence of the attorney general, solicitor general, or county attorney, to swear any witnesses, to testify before such grand jury; and it is made his duty to return to the court by which they were impanneled, a certified list of all witnesses so sworn, before the grand jury shall be discharged from their attendance upon the court; which list is to be filed and entered of record by the clerk thereof. The form of the oath usually required of a witness, to be taken before the grand jury, is as follows: "You swear, that the testimony which you shall give to the grand jury, relative to any matters and things which may come before them, shall be the truth, the whole truth, and nothing but the truth, so help you God." This mode of procedure, relative to swearing the witnesses by the foreman of the grand jury, and a list of their names returned and recorded in the court, was never practised in this State, prior to the statute of 1807, c. 140. But all witnesses, to be examined before the grand jury, were, before the passing of that act, sworn

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[1] Stat. Mass. 1807, c. 140, § 14.

[2] See the excellent remarks upon the performance of this duty, 1 Chitt. 312.

in open court, upon the motion of the attorney general, or public prosecutor. No record was ever made of the names of the witnesses thus sworn and examined; and of course there existed no means of proving the fact of their being thus sworn and examined, but in the recollection of those who had knowledge of it. The object of the legislature in this change of the mode of swearing the witnesses, and perpetuating the evidence of the fact, and of the names of the witnesses, is not expressed or indicated in any part of the statute; but this object undoubtedly was, to furnish and perpetuate legal and competent proof of the fact of the swearing of the witness, in all cases where it might be necessary to prove it; and most probably with a special reference to prosecutions for perjury, committed by witnesses in their testimony before the grand jury.

The *form of the oath* of a grand jury, prescribed in the statute of Massachusetts, of 1807, c. 140, § 14, is, in substance, and nearly in words, the same as it has been in England, for several centuries. That which is administered in succession to the members of the grand jury, after the two first, resembles, in a striking manner, the substance of the one used as long ago as the time of Bracton, in the reign of Henry the Third. Our form is, "The same oath which your fellows have taken on their part, you, and each of you, on your behalf, shall well and truly observe and keep." The form of a similar oath in the time of Bracton was, "*The oath which John here has taken, I will keep on my part; so help me God and these holy Gospels.*"[1]

Prior to the statute of 1807, c. 140, the foreman of the grand jury was appointed by the court; and the whole oath was administered first to the foreman; the commencement of which was made conformable to the then practice in all instances where the foreman was appointed by the court, viz. "You, as foreman of this inquest for the body of this county of S., do swear, &c." And the oath, subsequently administered to the members of the

[1] 3 Reeves' H. E. L. 133. The form of a Grand Juror's oath, as used in the English courts, is given in Cr. C. C., p. 11, 6th Ed. I find no other form of it in any of the writers upon criminal pleading, from the time of Tremaine.

grand jury, was, of course, made conformable to it, viz. "The some oath which your foreman hath taken, on his part, you, and each of you, on your behalf, shall well and truly observe and keep."

The nature of the oath, and the duties and obligations it imposes, are very explicitly pointed out in the words of it. "You shall diligently inquire, and true presentment make." The meaning of this branch of the oath can be nothing more than that a patient and impartial investigation shall be besfowed upon every subject properly and legally submitted to the consideration and inquiry of the grand jury. It cannot extend to any inquiry, or to any matter whatever, not within their jurisdiction; that is, to nothing but the evidence brought before them, of the crimes and offences committed within the body of the county for which they are sworn to inquire.

The practice, not uncommon in some parts of the United States, of bringing forward, in the form of presentments, what are denominated public grievances, relative to the political or moral state of the country, is altogether extra-official, and may be and has been adopted and pursued for purposes foreign to, and inconsistent with, the nature of the institution; and perhaps it is not too much to assert, that the opportunity has been used and perverted to party purposes, and with an intention to produce an effect upon public measures and the public mind. Whenever this shall be the case, it is to be considered in the same light as any other usurpation or abuse of the judicial authority. It may, with the same propriety, be exercised by any other branch of the judicial power; by the court, or the traverse jury, as well as the grand jury.

"Of all such matters and things as shall be given you in charge." The practice of the court, to instruct the grand jury in the nature of their duty, by what is called the *charge*, is very ancient, and comprises a full and clear definition and description of all the crimes and offences of which it is their duty to take cognizance. It also conveys to them the most important and necessary instructions as to the manner in which their business ought to be conducted, the nature of the evidence to be

submitted to them, and the rules and principles upon which it is to be applied. The offences, which the grand jury may make the subjects of their inquiry, are not, strictly speaking, restricted to those which may be enumerated in the charge of the court. Some offences may have been committed during the session of the court, after the grand jury have received their charge, and before they are dismissed. In these cases they have the same right to examine and present them, as though they had been specially directed concerning them, in the charge of the court; and where an offence has come to the knowledge of any of the body, it is their duty to communicate it to the grand jury, that such proceeding may be had as they may think their duty requires.

A most important injunction, in the oath of a grand juror, is that which imposes upon him the obligation of secrecy. The words of it are, "The Commonwealth's counsel, your fellows', and your own, you shall keep secret."[1]

Secrecy is not only consistent with, but essential to the nature of this institution. It has been held that the true object of the secrecy required is to prevent the evidence produced before the grand jury from being counteracted by subornation of perjury on the part of the defendant.[2] The obligation to preserve it extends to every transaction which takes place in the presence of the grand jury, and cannot be violated without a flagrant breach of the oath. This violation is a high misprision, and a finable offence.[3] It connects and involves the duty of the juror with the interest and safety of the government, with all the other members of the grand jury, and with his own responsibility and conscience; and it is a duty which a citizen is under the highest obligation to discharge, faithfully, and with a good conscience. Notwithstanding which, it is one of the most common occurrences in the history of grand juries, to find it disregarded. It is proper, however, to add, that this evil arises generally more from indiscretion, and want of con-

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[1] See Hawk. b. 1, c. 21, § 15.

[2] 4 Black. Com. 126, Christian's note (5); 1 Chitt. 317.

[3] 2 Hale, 161; 4 Black. Com. 126, Christian's note (5); 1 Chitt. 317.

sciousness of its pernicious consequences, than from any criminal design to injure or betray the interest of the government. The following are some of the pernicious effects of it. As soon as the decision of the grand jury is made, in a case pending before them, if it be against the party accused, the fact comes to his knowledge; and he then has an opportunity to abscond, if he is held by recognisance only. Another common and serious result of these hints or direct communications of what has been done, is a knowledge of the testimony of particular witnesses; to counteract which, the party accused offers other witnesses for examination; and thus the institution is converted, from a tribunal for the purposes of accusation, into a jury of trials, and affords a strong temptation for subornation of perjury.[1] Although the grand jury are instructed, that their proceedings are always intended to be *ex parte*, it is often difficult to convince them, that when their oath enjoins them "diligently to inquire," it is not their duty to hear all the evidence that is offered them. The effect is often equally pernicious in another way. When the party finds that he is to be indicted, it is very common for him to bring forward a counter prosecution against the complainant, and require that it shall be examined before the grand jury are dismissed. It often requires all the vigilance and authority of the public prosecutor, to defeat these impositions upon the justice of the public; and it is known from experience, that they are often the consequence of the careless observance of the oath of secrecy, in some member of the inquest. The act of divulging the secrets of a grand jury would not be so unjustifiable, if it affected the personal responsibility of him only, who commits it; but it is an act, which not only betrays his own secret, but is an essential injury to the government, and to the whole body of the inquest, by frustrating the most important objects of the institution.

In order to prevent injuries and abuses of this kind, it is a principle constantly given in charge to the grand jury by the court, that this obligation of secrecy *is perpetual*, and that a

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[1] 4 Bl. Com. 126, Christian's note (5); 1 Chitt. 317.

grand juror cannot be absolved from it at any period of his life. Nothing in the administration of public justice can be more rational or salutary than this principle. A violation of it may be the means of producing dangerous and violent animosities through life, among those who may be affected or injured by it.

The remaining part of the grand juror's oath requires no particular explanation. It simply binds him to a faithful, impartial, and conscientious discharge of his duty. "You shall present no man for envy, hatred, or malice." That is, you shall dismiss all the meaner and baser passions, when you assume the important and sacred obligations of deciding upon the guilt or innocence of a fellow being. "You shall leave no man unpresented, for love, fear, favor, affection, or hope of reward." That is, you shall guard yourself against all deviations from duty, to which you may be tempted by a partiality for friends, relations, or associates; and above and more than all, against the allurements of a base reward.

The state of society and morals in this country seems to forbid the possibility of a premeditated and wilful violation of this oath. Of all the situations involving public trust and confidence, that of a grand juror seems to afford the weakest temptation to official infidelity. Yet there have been instances within the observation of those who have had the means of knowing, where the frailty of human nature has yielded to the influence of private or partial motives and feelings. But these instances, perhaps, have arisen more from the *frailty* than the corruption of the individuals by whom they may have been indulged. It is most generally true, that when a man is called to give an opinion, or decide a question, which nearly interests his friends and connexions, his mind is prejudiced; and if he errs, he may be forgiven, upon the ground, that "he knows not what he does." Cases to which these remarks apply, are not unfrequent or unknown.

The *time of service* of the grand jury, in this country, is different in some respects from what it is in England. There they usually serve the whole of the sessions, or assizes.[1] But

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[1] 2 Hale, 156; Williams J. 1; 1 Chitt. 314.

the court may, in their discretion, order another grand jury to be returned and sworn. This is practised in some cases; namely, where, before the end of the sessions, the grand jury have brought in all their bills, and been discharged, and after that discharge, a new offence is committed, and the party arrested, and in gaol; or when, after the discharge of the grand inquest, a new offender is brought in, before the conclusion of the sessions.[1] The other instance of a new grand jury being summoned, is provided by an ancient statute, when they are to inquire of any concealment by a former inquest.

No instance of the kind first above mentioned is recollected in our practice, excepting in the county of Suffolk, Massachusetts, where the necessity of it arises from the concurrent jurisdiction of the Supreme Judicial and Municipal Courts in that county. Our practice is for the grand jury, when they have completed their business, to return into court and deliver in their bills; and if, after inquiry, they inform the court that they have no further business pending before them, and are thereupon unconditionally discharged from any further attendance, it is considered that, after such unconditional discharge, the court have no power to resummon them, or to summon a new grand jury.

This power of a conditional discharge of the grand jury, though not generally exercised in Massachusetts, as a matter of course, may still be considered to be a power inherent in the court. If there should be any doubt of the existence of such power, it ought to be immediately removed by legislative provision. It not unfrequently happens, that capital, and other atrocious offences, are committed after the grand jury are discharged, and before the final adjournment of the court. In such a case, the offender must suffer imprisonment during the whole vacation, before he can be tried, unless the grand jury are dismissed with a reservation, on the part of the court, to recall them, if occasion should require, before the end of the session. In England this conditional discharge never takes place; but in cases where an offence is committed after the discharge of the

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[1] 2 Hale, 156; Williams J. 1; 1 Chitt. 314.

grand jury, and before the final adjournment, the court have power, by the English statutes, to summon a new grand jury.

In the county of Suffolk, the same grand jury which are returned for the Supreme Judicial Court, are also authorized and required to perform the same duties in the Municipal Court, in all cases within the jurisdiction of that court. The practice, therefore, necessarily is, that when they have finished their business in the Supreme Court, in that county, they are not discharged from any further attendance, but until further order of court, and thereupon are informed, that if occasion should require it, they will be notified to attend a second time.

Fourthly. The right to challenge grand jurors, and of instructing them as to the principles of evidence.

Every indictment must be found by twelve men at least; every one of whom must possess the qualifications required by law, and be selected and returned in the manner the laws of the particular state in which he is to serve make necessary. If a grand juror has been convicted of any species of *crimen falsi,* as perjury, conspiracy, &c. which may render him infamous; or is an alien or outlaw, he is thereby disqualified from serving in that capacity. And any person who is under a prosecution for any crime whatever, may, by common law, before he is indicted, challenge any of the persons returned on the grand jury, for any of the causes above mentioned.[1] It was so decided in *Commonwealth* vs. *Smith,* 9 Mass. R. 110;[2] in which it is said by *Sewall* J. that objections to the personal qualifications of grand jurors, or to the legality of the returns, may be received from any person who is under presentment for any offence whatever, or from any person present, who may make the suggestion as *amicus curiæ.* In a subsequent case, however, doubts were expressed as to the correctness of that opinion.[3]

In the case of the *United States* vs. *Aaron Burr*, a motion was made by the prisoner to challenge the panel of the grand

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[1] Hawk. b. 2, c. 25, § 16; Bac. Abr. *Juries A.;* 1 Chitt. 307, and other authorities there cited.

[2] See *ante*, p. 5; and *Commonwealth* vs. *Parker et al.* 2 Pick. 568.

[3] Ibid.

jury. The ground of the motion was, that the marshal had proceeded irregularly in summoning some part of the panel. This motion was considered, both by the counsel and the court, as new and without precedent; but it was so far sustained, as that the juror, who was irregularly summoned, was considered as not being one of the panel.[1] Chief Justice *Marshall* remarked, that "there can be no doubt that this is the time when the accused has a right to take exceptions to the jury; and the only doubt can be, is this a proper exception?" He decided that it was.[2]

Grand as well as traverse jurors may be challenged for favor, as well by the government as the prisoner. And it is said, in the case of *United States* vs. *Burr*, that they may be required to declare, whether they have made up their mind, or formed and expressed an opinion of the guilt or innocence of the accused.[3] And the rule is laid down by Chief Justice *Marshall*, in the case of *United States* vs. *Burr*, that a man must not only have formed, but *declared* an opinion, in order to exclude him from serving on the jury.[4]

The right of the court *to instruct the grand jury*, as to the principles of evidence, on incidental points, as they arise on an examination of cases, when requested by them, is well established. But the right of the accused person to move the court to give specific instructions to the grand jury, on particular points of evidence stated in a particular case, has never been admitted. It would be manifestly improper for the court to commit themselves upon questions of law pending before the grand jury, which might come before them, to be decided on the trial. Some of the detailed points might never arise during the session of the grand jury; and any instruction on them would, of course, be unnecessary. Such points might be extremely difficult to

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[1] *United States* vs. *Burr*, Trial, i. 33, 37.

[2] Ibid. p. 37.

[3] Ibid. 43, 425.

[4] Burr's Trial, i. 41. But if he has actually *formed* an opinion, though he may have never *declared* it, and this appears from the answers to the questions put to him, it ought to disqualify him, and this is the practice in Massachusetts.

decide, and would require an argument of counsel. "There is no judge or man, who would not often find the solitary meditations of his closet very much assisted by the discussions of others."[1]

Fifthly. The mode of proceeding after the grand jury are organized, and are ready to proceed to business.

This mode varies, in some respects, in the different States; and from the practice in England. In the latter country, the prosecutor must cause his bill to be prepared and engrossed on parchment, before it is preferred to the grand jury. In the states of New York, Massachusetts, and, probably, in most of the United States, the bill is not drawn or preferred until after the examination of the witnesses by the grand jury, nor until after it has been ordered. This is undoubtedly the most rational and convenient course. Indeed, no bill can be correctly or safely drawn, until the state of the evidence, upon which it is found and is to be supported, has been minutely examined, and is thoroughly understood. Guilty persons often escape, and public prosecutions are often defeated, from negligence or misinformation as to the minute state of facts in the cases examined. This fact naturally suggests the inquiry, What is the duty of the grand jury, and of the public prosecutor, in this stage of a public prosecution?

There is, in many instances, and parts of the country, a jealousy on the part of the public, and sometimes between the grand jury and the public prosecutor, which ought not to exist, or be encouraged. In one State it has been decided by the Supreme Court, that it is not the right of the public prosecutor to remain in the grand jury room, and take any part in their proceedings; and whenever he does, it is at the request of the grand jury. This restriction supposes a want of official integrity on the part of the public prosecutor, and, perhaps, of impartiality on the part of the grand jury; for nothing that experience can teach, is more certain than that a perfect confidence and mutual co-operation between the public prosecutor and the grand jury are

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[1] Chief Justice Marshall, in *U. S.* vs. *Burr*, Trial, i. 174.

indispensable to the despatch and successful preparation and management of a criminal prosecution. In some countries, where the king's attorney is the king's tool, this jealousy may be excusable, and even laudable; but in this, the presumption in favor of official integrity and duty is universal. And when the nature of a public prosecution is such, that it cannot be conducted to a proper issue without a confidential and free intercourse between those to whom the management of it is intrusted by the government, the absence of such an intercourse will be the cause of constant embarrassment in prosecutions of crimes, and the execution of the laws. It is true that no person, however guilty, can be punished without being first accused by the grand jury; but it is equally true, that the grand jury, from their want of a competent knowledge of the technical niceties which are sanctioned by the law of crimes, would be constantly committing the most fatal errors in the discharge of their duty. It may be considered as generally true, that where the public prosecutor is excluded from a minute knowledge of the facts in a case, which has been examined before the grand jury, he will find himself foiled, at almost every step, in the management of the trial.

The duty and oath of a grand juror presupposes the presence of the public prosecutor at the examination of witnesses, and other proceedings before the grand jury. In Massachusetts, authority is given to the foreman to swear witnesses; but it is given upon the express condition, that the public prosecutor shall be present when the oath is administered.

The grand juror's oath binds him to *keep the secrets of the commonwealth's counsel.* What secrets or what counsel can the commonwealth have, which a grand juror is bound to keep, unless they were obtained in the presence of, and by taking a part in the proceedings of the grand jury? The inquiry, therefore, becomes extremely important, What is the duty and what are the rights of a public prosecutor, to be present at the examination of witnesses, and take a part in, and know the result of such examination?

It is not contended that the public prosecutor has a right to remain with the grand jury during the time that they are deliberating upon, or deciding any question of finding a bill, unless at their request, or by their permission. This, however, is not unusual in England.[1] But for the purposes of conducting the examination of witnesses, and all the arrangements preparatory thereto, the presence and aid of the public prosecutor is necessary and indispensable; and the following course upon that subject has been found productive of the greatest despatch, and liable to no legal or important objections; and without which, the whole term of the court would often be insufficient to enable the grand jury to complete their business.

Previous to the session of the court, proper measures should be taken to insure the punctual return of all summonses and recognisances of witnesses. When their names are ascertained and noted in a docket, under each complaint or process, they should be particularly instructed not to be absent, when called to attend the grand jury. For this and other purposes, the sheriff should select the most active and vigilant of his officers to attend the grand jury. When the witnesses are thus collected, and their punctual attendance secured, the public prosecutor enters the grand jury room, and gives the grand jury some general information relative to the state of the gaol, and the number and nature of the prosecutions to be brought before them. The order in which the cases are presented for examination is altogether a matter of discretion with the public prosecutor. *He only* has the means of knowing the most advisable course in this particular. If there are any capital cases pending, they ought to be the first that are submitted to the examination of the grand jury. A bill for each capital offence ought to be previously prepared, and, if ultimately found, the grand jury ought to be carried into court, the bill delivered and filed, and the prisoner arraigned, before the grand jury proceed to any other business. This course is rendered necessary by the important preparations necessary for the trial of all prisoners charged with a capital offence.

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[1] 1 Chitt. 317.

The grand jury then proceed upon the other business pending before them, in the order in which it is convenient for the public prosecutor to introduce it.

All the witnesses, in the particular case to be examined, are then sent in to the grand jury, and the oath administered to them all at the same time, by the foreman of the grand jury, in the presence of the public prosecutor. The witnesses then retire, except the one first to be examined; and they are, in all cases, examined separately, and in the absence of each other. After the nature of the case is shortly explained, the attorney for the government commences the examination of the witness, and he is examined and cross-examined by him, until he has obtained all the testimony which the witness can give. He is then turned over to the grand jury for their examination, and the foreman is informed, that he or any member of the grand jury can examine him, as much and as long as they deem expedient. The same course is pursued with all the other witnesses; and at the close of the examination the question is submitted, whether there shall be a bill or not.

It is the duty of the public prosecutor, during the discussion of this question, to remain perfectly silent, unless his advice or opinion in a matter of law is requested. The least attempt to influence the grand jury in their decision, upon the effect of the evidence, is an unjustifiable interference, and no fair and honorable officer will ever be guilty of it. It is very common, however, for some one of the grand jury to request the opinion of the public prosecutor, as to the propriety of finding the bill. But it his duty explicitly to decline giving it, or even any intimations upon the subject; but in all cases to leave the grand jury to decide independently for themselves. It may be thought that this is too great a degree of refinement in official duty. But the experience of thirty years furnishes an answer most honorable to the intelligence and integrity of that body of citizens from which the grand jury are selected; and that is, that they almost universally decide correctly. This is the natural effect of justice and truth upon minds left uninfluenced and unembarrassed by the conflicting opinions or arguments of others. There is one

case in which it is proper, and certainly the duty of the government's counsel to rescue the grand jury from an erroneous decision; which is, when they judge correctly upon the evidence, but are mistaken in the application of it to points and principles of law. This is not unfrequently the case; but a single hint from an officer, respected for his integrity and knowledge of the laws, is sufficient to correct the error. But in all cases, where the grand jury solicit the opinion of the public prosecutor in matters of law, it is his duty to give it, and to afford them all the light and information of which he is capable; and this privilege of the grand jury, and duty of the public prosecutor, are usually stated by the court, in their charge to the grand jury.

Whatever may be the jealousies of some, upon the subject of this free and confidential intercourse between the government's counsel and the grand jury, it is next to impossible that public prosecutions can be conducted with despatch and correctness without it. However intelligent and judicious the members of a grand jury may be, they are not in the habit of examining witnesses, and preparing evidence to be used in public trials in courts of law. If they were left without official aid and instruction, there are many counties in which the whole term would be insufficient to enable them to accomplish the business of the government. The impossibility of such a course may be exemplified, by supposing the traverse jury to be left to conduct the trials brought before them, without the assistance of counsel or the court.

One of the most fatal consequences of excluding the public prosecutor from the examination of the witnesses before the grand jury, and, of course, from the knowledge of the evidence upon which an indictment is to be supported, is, that, in that case, the indictments must be drawn from the minutes of the evidence, taken by the grand jury. These are necessarily insufficient and incorrect in points and facts, which are essential to the validity of an indictment, but which are not known to be so by any but those who are skilled in technical accuracy. Prosecutions have often been defeated, and the guilty escaped unpunished, from this cause. There is no legal course to be pursued, to prevent

this evil. It may be said, that the public prosecutor may obtain this information by a private examination of the witnesses. But he has no means or legal right to compel their attendance before him for that object; nor has he any authority whatever to compel them to disclose to him the evidence they shall give on the trial; and thus he may be under the necessity of entering upon an important public trial, wholly unprepared, and liable to be defeated at every step he advances.

The origin of this objection to the presence of the government's attorney during the examination of witnesses before the grand jury, may be traced to the practice and usages in England. There, except in cases of high treason, the prosecutor is the individual who brings forward the prosecution, and is, in fact, the party to it, although it is instituted and proceeds in the name of the king. This is so entirely the case, that the prosecutor is liable for the costs of the prosecution. It would, therefore, be improper, generally, to admit him before the grand jury, and thereby give him an opportunity to influence or mislead them; more especially, when the nature and design of the institution is, that the proceedings shall be *ex parte*, that is, in the absence of the party accused. Yet in England it is not unusual, excepting in the King's Bench, to permit the prosecutor to be present. In this country, no such practice or state of things exists. The government is the accuser, and, as it is presumed to be "no respecter of persons," it can have no motive or interest to oppress its citizens, or subject them to any inconvenience or injury, which does not necessarily arise from a perfectly impartial and disinterested mode of investigating and punishing public offences.

Sixthly. The nature of the evidence before the grand jury; and the manner in which it is to be received and decided upon.

The grand jury hear evidence only in support of the charge, and not in exculpation of the party accused; and, in general, they ought never to hear any other evidence than that which is produced by the government.[1] But as they are sworn to pre-

[1] Hawk. b. 2, c. 25, § 145, *in notis*; 1 Chitt. 318, 319.

sent the truth, as it comes to their knowledge, which necessarily requires investigation, if, in the course of such investigation, it appears that there are other witnesses than those produced for the presecution, and the grand jury are actually convinced that their testimony may be material and pertinent, and of such a nature as would elucidate or explain the evidence for the government, and lead them to a more perfect knowledge of the merits of the case, it is said they may require the testimony of such witnesses.[1] But in this case, great judgment and extreme caution ought to be used, to guard against the danger of hearing evidence on the part of the defendant, and thus changing the institution of a grand jury to that of a traverse jury; by which the whole merits of the case may be decided in a private, instead of a public, tribunal. The grand jury, in the regular discharge of their duty, cannot admit, or hear any testimony, but such as is properly produced to them in support of the prosecution; if, however, the truth is not, by such testimony, sufficiently demonstrated, it is said they may properly seek other information, *relative to mere facts*, but cannot proceed further.[2]

It was formerly held, that the grand jury ought to find a bill, if *probable* evidence were adduced to support it, because it is only an accusation; and the prisoner can defend himself on his trial.[3] But this is an oppressive and dangerous position; and has since been denied and almost reprobated by the greatest sages of the law, who have deprecated the ignominy, dangers of perjury, the anxiety of delay, and the misery of a prisoner, that might be the consequence of an accusation of an offence, upon evidence that does not fully satisfy the grand jury of the guilt of the defendant.[4] Accordingly, it has now become a settled principle, that the grand jury cannot, consistently with their oath, find a bill, except on such testimony as would justify them, as a traverse jury, to find the prisoner guilty.[5] It is asserted in this note,

[1] 1 Chitt. 318, cites Dick. Sess. 116, and other authorities.

[2] 1 Chitt. 318, cites Dick. J. *Indictment*, 4; Burns J. *Indictment*, 5.

[3] 2 Hale, 157; 1 Chitt. 313.

[4] 1 Chitt. 318, and the numerous authorities there cited.

[5] Hawk. b. 2, c. 25, § 145, *in notis*.

quoted in Bacon, that it is the doctrine of Lord Hale, confirmed by *Pemberton* C. J. in the trial of Lord Shaftesbury, (referred to in the note,) that as an indictment is merely an accusation, and the party is afterwards to undergo a trial, the grand jury ought, UPON PROBABLE EVIDENCE ONLY, to find a bill. *This doctrine is wholly inadmissible in any government, where the protection of the innocent and the rights of the accused are among the first objects of the constitution and laws.* The reason of that principle of the law of evidence, that if a jury of trials entertain a doubt of the guilt of the party accused, they ought to acquit him, is equally applicable to a grand jury.[1]

With respect to the *kind* of evidence which a grand jury may receive, they are bound to demand the best legal proof of which the case admits. It must be given upon oath or affirmation.[2] If the grand jury receive the testimony of a person not under oath, the indictment will be quashed, as irregularly found.[3]

The grand jury ought not to find a bill upon the testimony of incompetent witnesses, such as have been convicted of infamous crimes. And where the fact of such incompetency is known to the public prosecutor, he ought to refuse the admission of the witness to the grand jury.[4] And it is a rule without an exception, that no evidence can be admitted or received by the grand jury, which would not be admitted on the trial of the defendant; such as hearsay evidence, affidavits, depositions, &c.; the nature of criminal prosecutions requiring that the witnesses and party shall be brought face to face.

An accomplice, not otherwise disqualified, may give evidence before the grand jury, in support of a charge against his associate in guilt; and he may be brought before the grand jury by *habeas corpus*, for that purpose, if he be in prison. If the prison in which he is confined be within the county, when and where the court and grand jury are in session, he may be brought before the grand jury to testify, by a simple order of court. And the prosecutor, or complainant, however injured by the crime alleged

[1] 1 McNally, 2–6.
[2] Hawk. b. 2, c. 25, § 133.
[3] 2 Gall. R. 364.
[4] 1 Chitt. 319.

to have been committed, is, in general, a competent witness. In England, and in some of the United States, in the case of forgery, the party, whom the forged instrument is intended to defraud, is an exception.[1] If the jury have any doubt upon the propriety of admitting any part of the evidence offered them, they may ask the advice of the court upon the subject.[2] And if they should find a bill upon incompetent or improper evidence, yet if the prisoner be afterwards tried and convicted upon legal and sufficient testimony, the conviction cannot be impeached.[3]

The manner in which evidence is received and decided upon by the grand jury, is required, by the nature of the institution, to be private and in secret. The oath of a grand juror requires this of him, and the disclosure of the evidence is punished as a misdemeanor, with fine, and, probably, imprisonment. The offence is not only finable, as a misprision, but may be considered so as a contempt. If these proceedings were permitted to be public, the whole object of the institution would be defeated. Yet a case is recorded in one of the volumes of the State Trials in England, in which it was contended and decided, that the evidence to be given to the grand jury *might be heard in court.* I refer to the trial of the Earl of Shaftesbury, in Hargrave's St. Tri. vol. iii. p. 420. In that case, after the charge was given to the grand jury, by Lord Chief Justice *Pemberton*, the attorney-general moved, that the examination of the witnesses, and the evidence to be given before the grand jury, should be in open court. *This motion was sustained*, and the reason insisted on by the lord chief justice, and upon which the decision was founded, was, *that such had been the universal custom, in ancient and later times.* The grand jury, in the above trial, repeatedly and strenuously objected to this course; alleging, that by their oath they were required to keep the king's secrets; to which

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[1] Is not this altered by the late statutes for the improvement of the criminal code in England?

[2] 1 Chitt. 320; Hawk. b. 2, c. 25, § 145, *in notis;* 4 Black. Com. 303, note 1; 2 Hale, 159, 160.

[3] Hawk. b. 2, c. 25, § 145. — See note to § 145, Dr. Dodd's case; [1 Leach. 156, 157.

the lord chief justice replied, "The oath that requires that 'the king's counsel, your fellows', and your own, you shall keep secret,' refers to *your debates*, and not to the evidence given to the jury!" There is nothing in the history of English jurisprudence which strikes an American with more astonishment and abhorrence than this procedure. Without having taken the trouble to examine the truth of the assertion, that "such had been the universal custom, in ancient and later times," it is to be hoped that the *custom* ceased with the reign of Charles the Second, and with the judges of his creation.[1]

It is said to be the right and duty of the grand jury, that if they know of the commission of any offences, to inquire into them, and have them punished, although not presented to them.

Seventhly. The right of the grand jury to compel the attendance of witnesses; the finding the bill, &c.

Most witnesses who appear to testify before the grand jury, are under recognizance for that purpose, either taken by a magistrate or in the judicial courts. And all witnesses, whose testimony is material to the finding of an indictment, are compellable, at the order of the grand jury, to appear before them and give their evidence.[2] A summons issues for this purpose, by the procurement of the public prosecutor, from the clerk of the court at which the grand jury are in session. Justices of the peace, also, in Massachusetts, are expressly authorized by statute to grant *subpœnas* for witnesses, in criminal causes, pending in any court having criminal jurisdiction, provided it be done at the request of the public prosecutor.[3] And in all cases, where witnesses are lawfully summoned before the grand jury, and refuse to attend, the court will grant an attachment against them. on which they may be taken and committed. And if, when a witness appears, he refuse to be sworn, or testify, the court may impose an immediate fine upon him, and he may be committed

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[1] 4 Black. Com. 302, note by Christian.

[2] 1 Salk. 278; Bac. Abr. *Evidence, D.*; 6 T. R. 295; 8 T R. 585; 1 Chitt. 320.

[3] Stat. 1783, c. 51; and Stat. 1791, c. 53, § 6.

for a contempt; from which liability no privilege can excuse him.[1]

After the grand jury have heard the evidence, they are to decide whether the bill shall be found or rejected. Twelve of the jury, at least, must concur in finding the bill; and if the rest of the jury dissent, the finding will still be valid.[2] And if the foreman does not concur in finding the bill, he must, nevertheless, sign and authenticate it, as foreman, provided twelve should agree to it; for it is not the foreman's bill, but that of the grand jury, whose organ he is for this purpose.

If a bill be ready drawn and presented to a grand jury, containing one charge only, the jury cannot find one part of it true, and another false; but they must either reject or maintain the whole; and, therefore, if they endorse a bill of indictment for murder, a true bill for manslaughter, and not for murder, the whole will be invalid. This rule, however, does not extend to the finding of different counts; for as each count contains a distinct charge, the jury may find a true bill upon one of them only.[3] It is a rule, however, that, in cases of homicide, it is generally most safe for the jury to return a bill for murder, when the fact of killing is proved. On such an indictment the prisoner may be found guilty of manslaughter, and not guilty of murder.

The distinctions and difficulties above stated, may be, and are avoided, in all cases where the indictment is not drawn and presented, until after the grand jury have heard and considered all the evidence, and have decided upon the offence for which the bill is to be found. In such case, the bill is always drawn conformably to the evidence, and may contain as many counts as the nature of such evidence will justify, and may render expedient. Such is and has been the practice in Massachusetts and other States, and is found to be most convenient, and strictly conformable to the nature of criminal proceeding. The practice

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[1] 1 Chitt. 321; 1 Hawk. c. 22, § 4; 1 Salk. 278; Bac. Abr. *Evidence, D.*; Dick. Sess. 90.

[2] 1 Chitt. 322; 2 Hale, 161; 4 Black. Com. 306.

[3] Hawk. b. 2, c. 25, § 2; 1 Chitt. 322; Cowp. 325, and other authorities there quoted.

of drawing and preferring the bill before the evidence is examined by the grand jury, obtains in England, and those American States where the English practice in this particular is adopted, and where the party injured is, in fact, though not in name, the prosecutor.

If the indictment found is defective, a new and more regular one may be framed and found. The mere insufficiency of the finding, affords no future indemnity to the party indicted.[1]

Eighthly. Amendment of indictments, by consent of the grand jury.

It is settled, in England, both by express exceptions in the Statutes of Amendments, and the current of authorities, that indictments are not within their operation; and that, therefore, they stand upon the same principles with respect to amendment, as those to which all pleadings were subject at common law.[2] As the indictment is the finding of a jury upon oath, it cannot be amended by the court without the concurrence of the grand inquest, by whom it is presented.[3] And it is the common practice in England, for the grand jury to consent that the court shall amend matters of form, altering no matter of substance; mere formalities may, therefore, be amended by the court, before the commencement of the trial.[4] The time at which the grand jury are called upon to consent to the amendment of their indictments, is differently stated in different authors. In a note in Hawkins, and in Chitty it is said, that this consent is obtained at the time the grand jury are sworn. In the text of Hawkins it is stated, that this amendment is consented to by the grand jury when they are before the court.[5] But in the Cro. C. C. 12, (6th Ed.) it is thus laid down: "The court sends for the grand jury; and when they appear, the clerk calls them severally by their names, and says, '*Gentlemen, have you agreed upon any*

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[1] 4 Black. Com. 305, 306; Bac. Abr. *Indictment, D.*; Fost. 104. 106.

[2] 1 Chitt. 297, quotes 4 Burr. 2569, 2570; 1 Hale, 193; Hawk. b. 2, c. 25, § 97; Bac. Abr. *Indictment, G.* 11, and other authorities.

[3] 1 Chitt. 297; 4 Burr. 2570; Hawk. b. 2, c. 25, § 98; 6 Mod. 281.

[4] 1 Chitt. 297, 298; Hawk. b. 2, c. 25, § 98; Bac. Abr. *Indictment, H.* 11.

[5] 1 Chitt.

bills?' And the clerk bids them present them to the court; and upon delivery of them, he saith, '*You are content the court shall amend matter of form, altering no matter of substance, without your privity, in these bills you have found?'* The grand jury say, *Yes.* The court then proceed to arraign the prisoners."

There seems to be no doubt, therefore, that an indictment, as well in capital cases as misdemeanors, may be amended by order of court, in *matters of form*, by *the consent* of the grand jury; and that the principles and practice of the common law have sanctioned this procedure.[1]

It is laid down in Starkie, 245, that it is the common practice, at present, to amend indictments in matters of form, whilst the grand jury are before the court; for which purpose they formally give their consent that the court shall amend matters of form, altering no matter of substance. When an indictment appeared to be insufficient, either for its uncertainty, or for want of proper legal words, it was anciently the practice to award process to the grand jury, if the court sat in the same county, to amend it.[2] It is presumed not to be competent to the courts in this country to adopt this latter course. When the grand jury have finished their business, and been *unconditionally* discharged, they cannot be resummoned and reorganized. No grand jury can be created or brought into existence, but in the manner directed by the statutes of the State.

There appears to be no objection to the introduction of the practice of amending indictments, in mere matters of form, by the consent of the grand jury, into the courts of this country. On the contrary, it would be the means of preventing the escape of atrocious offenders, from the most trifling defects, not at all affecting their rights, and which operate to the manifest injury of public justice. This evil, according to our present practice, is without remedy. The grand jury are usually discharged at the moment they have finished their business, and delivered their bills into court, and before the prisoners are ar-

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[1] 1 Chitt. 298.

[2] Stark. 245; 2 Hawk. c. 25, § 98.

raigned. They, of course, immediately leave the court, and return to their homes. If, after this, the most trifling mistake in the indictment is discovered, on the arraignment of the prisoner, there is no way to correct or amend it, but by the consent of the party accused; this can rarely be expected. This evil, trifling as is the cause of it, and injurious as are the consequences of it, can never be avoided, so long as the public prosecutors are subject, in common with the rest of mankind, to human frailty. The remedy, however, is perfectly simple, and fully vested in the judicial courts, by the provisions and principles of the common law. And it is known to the author of these remarks, that some of the most eminent judges in the country have been, and now are, decidedly of opinion, that the English practice before referred to, in regard to amendments of matters of form in indictments, by the consent of the grand jury, ought to be adopted in the American courts. If it were, it might, in an important instance, do away the reproach which often follows the acquittal of a criminal, whose guilt is not only apparent, but admitted, by reason of trifling errors and omissions, to which the most accurate are liable and in the habit of innocently committing. The technical strictness of criminal proceeding may doubtless be relaxed, so as to insure the punishment of the guilty, and without depriving the accused of any just means of defence.

Among the late improvements in the criminal law of England, is the statute of 7 Geo. 4, c. 64, § 19, by which it is provided, that no indictment shall be abated by reason of any dilatory plea of misnomer, or want of addition, or of a wrong addition; but the court may amend the same, and require the party to plead. And by section 20, of the same statute, no indictment or information shall be stayed or reversed, for omitting to state the *time* at which the offence was committed, in any case *where time is not the essence* of the offence; nor for stating time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment; or on an impossible day; or on a day that never happened.

These rational and liberal improvements would be adopted in all the States of this Union, if the mischiefs, escapes of the guilty

from punishment, and, in many instances, the indignation, which are the result of this technical strictness in criminal prosecutions, were fully known and understood.

Since the above paragraph was written, the legislature of Massachusetts, by a statute of 1830, c. 49, have passed "An Act for the Prosecution and Punishment of Accessories in Felonies," in which the late improvements in the British government upon that subject have been adopted. R. S. c. 133.

PRECEDENTS OF INDICTMENTS.

ABORTION.

1. *At Common Law; for administering a Potion, with Intent to cause an Abortion.*[1]

Commonwealth of Massachusetts.

Suffolk ss.[2] At the Supreme Judicial Court of the said Commonwealth of Massachusetts, begun and holden at Boston, within and for the said county of Suffolk, on the Tuesday of in the year of our Lord one thousand eight hundred and thirty:

The jurors for said Commonwealth upon their oath present, that A. B. of in the county of laborer, on the day of in the year of our Lord one thousand eight hundred and thirty, at Boston aforesaid, in the county aforesaid,[3] did, unlawfully and wickedly, administer to, and cause to be administered to and taken by one C. D., single woman, she the said C. D. being then and there pregnant, and quick with child,[4] divers quantities, to wit, four ounces, of a certain noxious, pernicious, and destructive substance, called *savin;* with intent thereby to cause and procure the miscarriage of the said C. D., and the premature birth of the said child, of which the said C. D. was then and there pregnant and quick; by the means whereof, the abortion, miscarriage, and premature birth of the said child was caused and produced. And she the said C. D., afterwards, to wit, on the day of next following, at

[1] 3 Chitt. C. L. 797–800.

[2] The name of the county must be in the margin or repeated in the body of the caption. 2 Hale, 166.

[3] The words "force and arms" are omitted in this, and may be in the following precedents, as unnecessary. See for this, the following authorities. 2 Hawk. c. 25, § 90; 2 Hale, 187, and the authorities there quoted.

[4] Or, according to some authorities, "being then and there pregnant with a quick child."

B. aforesaid, in the county aforesaid, by means of the noxious, pernicious, and destructive substance aforesaid, so as aforesaid administered by the said A. B., and taken by the said C. D., was prematurely delivered of the said child, against the peace and dignity[1] of the Commonwealth aforesaid.

2. *For causing an Abortion by an Instrument.*[2]

[*Draw the caption as in precedent No.* 1.]

That A. B. of in the county of laborer, on the day of in the year of our Lord one thousand eight hundred and at B. aforesaid, in the county of aforesaid, did, unlawfully, knowingly, and inhumanly, force and thrust a certain instrument, called a which the said A. B. in his right hand then and there had and held, up and into the womb and body of one C. D.; she the said C. D. being then and there pregnant, and quick with child; with a wicked and unlawful intent to cause and procure the said C. D. to miscarry, and to bring forth the said child, of which she was then and there pregnant and quick as aforesaid; and that she the said C. D. afterwards, to wit, on the day of then next ensuing, at B. aforesaid, in the county of S. aforesaid, by means of the forcing and thrusting of said instrument into the womb and body of her the said C. D., in manner aforesaid, did bring forth the said child, (of which she was so pregnant and quick,) dead; against the peace and dignity of the Commonwealth aforesaid.[3]

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[1] The word "dignity," at the close of the precedent, may also be omitted as unnecessary. For this see Hawk. b. 2, c. 25, § 94; 2 Hale, 188, and other authorities there referred to. But in the following precedents it is generally retained. V. R. S. c. 137. § . 14.

[2] 3 Chitt. 800.

[3] *Commonwealth* vs. *Bangs*, 9 Mass. R. 387. In this case it was decided, that the indictment must contain an allegation that an abortion ensued, and that the woman was *quick with child.* There is no authority referred to in the case, for the above opinion. And see 3 Chitt. 799, 800, where there is a precedent for procuring abortion, by means both of administering noxious medicines, and of an instrument; in the three last counts of which there is no averment that the woman was quick with child.

3. *For administering noxious Potions, &c. with Intent to procure an Abortion.*[1]

[*Draw the caption as in precedent No.* 1.]

The jurors for said Commonwealth upon their oath present, that A. B. of in the county of laborer, on the day of in the year of our Lord, &c. with force and arms, at aforesaid, in the county aforesaid, in and upon one C. D., in the peace of said Commonwealth then and there being, did make an assault, she the said C. D. being then and there big, pregnant, and quick with child; and that he the said A. B. then and there knowingly, unlawfully, wilfully, wickedly, maliciously, and injuriously, did give and administer, and did cause and procure to be given and administered to the said C. D., so being big, and pregnant, and quick with child as aforesaid, divers deadly, dangerous, and pernicious drugs, potions, and mixtures, with a wicked and unlawful intent to cause and procure the said C. D. to miscarry, and to bring forth the said child, with which she was then and there pregnant and quick as aforesaid, dead; by reason and means whereof the said C. D. became and was rendered weak, sick, and distempered in her body, for the space of six months; and the life of the said C. D. thereby greatly endangered; and other wrongs then and there did, to the great damage of her the said C. D., and against the peace of the Commonwealth aforesaid.

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[1] This precedent is selected from 3 Chitt. C. L. 800. It is drawn at common law, and contains the allegation of an assault. It is not alleged that C. D. was quick with child, nor that the abortion was produced; neither is the name of the medicine given. It may be advisable in all cases, when the name of the medicine or drug is unknown, to allege in the indictment that it was a certain dangerous &c. drug, potion, &c. "*the name of which is to the jurors aforesaid unknown.*" But see 3 Chitt. 798, note (u), where it is said the name of the poison is not material; cites 3 Campb. 75.

There are several other precedents in Chitt. C. L. and in Archibald Cr. Pl., drawn upon the late English statute of 43 Geo. 3, c. 58. But the statute is now repealed, by the recent statute of 9 Geo. 4, c. 31, intitled an act for "consolidating and amending the statutes of England, relative to offences against the person;" in which a new provision upon the subject of this offence is introduced.

4. *For administering a Decoction of Savin, to procure an Abortion in a Woman, before the Quickening.*[1]

That A. B. of &c. on and on divers other days and times, between that day and the day of taking this inquisition, at &c., wilfully, maliciously, and unlawfully, did administer, and cause to be administered to, and taken by one C. D., single woman, divers quantities, to wit, six ounces, of the decoction of a certain noxious and destructive shrub, called *savin;* the said C. D., on the said day of, &c. and continually from thence, until the day of at aforesaid, being with child, but not quick with child, at the respective times of administering the decoction of the said shrub called *savin,* as aforesaid; with intent thereby to cause and procure the miscarriage of the said C. D.; against the peace &c.

ACCESSORY. *Larceny.*

5. *Indictment against an Accessory to a Larceny before the Fact.*[2]

[*Caption as in precedent No.* 1. *Then proceed.*] The jurors for said Commonwealth of Massachusetts upon their oath present, that A. B. of in the county of laborer, on the day of in the year of our Lord one thousand eight hundred and at Boston, in the said county of Suffolk, one silver spoon, of the value of one dollar, of the goods and chattels of one C. D., then and there in the possession of the said C. D. being found, feloniously did steal, take, and carry away, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present, that E. F. late of in the county of laborer, before the committing of the felony and larceny aforesaid, to wit,

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[1] This precedent is taken from 3 Chitt. 798, and is drawn upon the statute of 43 Geo. 3, c. 58, § 2. But it is inserted here upon the presumption that the facts therein stated would amount to a misdemeanour at common law.

[2] The following precedents against accessroies are selected from Tremaine's Pleas of the Crown; Chitt. Cr. Law; Cr. Cir. Comp.; and Starkie Cr. Pl. The superfluous matter and obsolete words, in these and most of the other precedents of indictments in the ancient English forms, are not adopted.

on the day of in the year last aforesaid, at aforesaid, in the county aforesaid, did knowingly and feloniously incite, move, procure, aid, abet, counsel, hire, and command the said A. B. to do and commit the said falony and larceny, in manner and form aforesaid, against the peace and dignity of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

6. *Against an Accessory, for receiving the principal Felon.*

[*State the offence against the principal felon, as in the next preceding precedent, and then proceed as follows.*]

And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D. of in the county of laborer, well knowing the said A. B. to have done and committed the felony and larceny aforesaid, in manner and form aforesaid, afterwards, to wit, on the day of in the year of our Lord one thousand eight hundred and at B. aforesaid, in the county aforesaid, him the said A. B. did then and there knowingly and feloniously receive, harbour, conceal, and maintain, in the larceny and felony aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[2]

7. *Against an Accessory, for receiving Stolen Goods.*

[*State the offence against the principal felon, as in precedent No. 4, and then proceed as follows.*]

And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D. of in the county of laborer, afterwards, to wit, on the day of now last past, at B. aforesaid, in the county aforesaid, the goods and chattels aforesaid, to wit, one gold ring, of the value of two dollars [*here state all the articles found upon the accessory, their value, &c.*] so as aforesaid feloniously stolen, taken, and carried away, by the said A. B. in manner aforesaid, feloniously did receive and

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[1] 2 Stark. Cr. Pl. 456; Cro. C. C. 124. This indictment concludes at common law.

The words in the statute of Massachusetts of 1804, c. 143, used in the cases of accessory before the fact, are, "any person who shall be accessory thereto before the fact, by counselling, hiring, or otherwise procuring the same to be done." These words are used in most of the statutes of Massachusetts against capital offences, as against accessories before the fact.

[2] 2 Stark. Cr. Pl. 456; Mass. Laws. Stat. 1804, c. 143, § 10; Cro. C. C. 125 (6th Ed.); 2 Chitt. C. L. 6. R. S. c. 126. § 17. c. 133. § 1.

have, and did then and there feloniously aid in concealing the same; he the said C. D. then and there well knowing the same goods and chattels to have been feloniously stolen, taken, and carried away as aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

NOTE.—When the principal has been convicted in one county, and the stolen goods received in another, the form will be the same as in this precedent; the conviction of the principal being alleged conformably to the record in the county where it was had.

8. *Indictment for a Misdemeanor, against an Accessory, for receiving stolen Goods, the Principal not having been prosecuted.*

The jurors for said Commonwealth upon their oath present, that A. B. of in the county of laborer, on the day of in the year of our Lord one thousand eight hundred and at B. aforesaid, in the county aforesaid, one silver tankard, of the value of twenty dollars, of the goods and chattels of one C. D., by one E. F.[2] then lately before feloniously stolen of the said C. D., unlawfully, unjustly, and for the sake of unlawful and wicked gain, did receive and have; the said A. B. then and there well knowing the same to have been feloniously stolen; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[3]

9. *Against an Accessory for a Misdemeanor, in receiving stolen Goods, the principal Felon being unknown.*

The jurors for said Commonwealth upon their oath present, that A. B. of in the county of laborer, on the day of now last past, at aforesaid in the county aforesaid, one silver tankard, of the value of twenty dollars, of the goods and chattels of one C. D., by an evil disposed person, to the jurors aforesaid yet unknown, then lately before feloniously stolen of the said C. D., unlawfully, unjustly, and for the sake of wicked and unlawful gain, did receive and have; he the said A. B. then and there well knowing the said goods and chattels

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[1] 2 Strak. Cr. Pl. 457; Mass. Laws, Stat. 1804, c. 143, § 10; Cr. Cir. Comp. 125. 2. m. 409.

[2] The name of the principal ought to be stated, if known. East, P. C. 783.

[3] 2 Mass. Laws. Stat. 1804, c. 143, s. 11. See next precedent. R. S. c. 126 § 20.

to have been feloniously stolen; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

10. *Against an Accessory, for a second Offence in receiving stolen Goods, the principal Felon being unknown.*[1]

The jurors for said Commonwealth upon their oath present, that A. B. of in the county of laborer, on the day of now last past, at aforesaid, in the county aforesaid, one silver tankard of the value of twenty dollars, of the goods and chattels of one C. D., by a certain evil disposed person to the jurors aforesaid unknown, then lately before feloniously stolen of him the said C. D., unlawfully, unjustly, and for the sake of unlawful and wicked gain, did receive and have; he the said A. B. then and there well knowing the said goods and chattels to have been feloniously stolen as aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, at the Supreme Judicial Court of said Commonwealth, begun and holden at within and for the county of on the Tuesday of in the year of our Lord one thousand eight hundred and the said A. B. was duly and legally charged and convicted, for that he the said A. B. on at seventeen yards of linen cloth, of the value of five dollars, of the goods and chattels of one E. F., by a certain ill disposed person to the jurors who found the bill of indictment upon which the said A. B. was then and there convicted as aforesaid, then unknown, then lately before feloniously stolen of him the said E. F., unlawfully, unjustly, and for the sake of wicked and unlawful gain, did have and receive, he the said A. B. then and there well knowing the said seventeen yards of linen cloth to have been feloniously stolen as aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

11. *Accessory before the Fact, to a Robbery.*

[*Frame the indictment against the principal, according to the facts in the case, and the forms of indictment against the principal in Robbery; and then proceed.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B. of, &c.

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[1] 2 Mass. Laws, Stat. 1804, c. 143, § 12. R. S. c. 126. § 22.

before the said felony and robbery was committed in manner and form aforesaid, to wit, on the day of in the year aforesaid, at aforesaid, in the county of aforesaid, wilfully and feloniously did counsel, hire, and procure the said A. B. the felony and robbery aforesaid, in manner and form aforesaid, to do and commit; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

12. *Against an Accessory after the Fact.*

[*Set out the offence against the principal, in the form of the next preceding precedent, and then proceed.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B. of, &c. after the felony and robbery aforesaid was committed in manner and form aforesaid, by him the said C. D. to wit, on, &c. at, &c. he the said A. B. then and there did become accessary thereto, after the fact, by knowingly receiving, harboring, comforting, and maintaining, and otherwise unlawfully assisting the said C. D.; he the said A. B. then and there well knowing the felony and robbery aforesaid to have been done and committed by the said C. D. in manner and form aforesaid; against the peace, &c. and contrary to the form of the statute, &c.

13. *Indictment against an Accessory before the Fact, in Murder.*[2]

[*Frame the indictment against the principal in the usual form, alleging the nature of the murder, and then proceed as follows.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B. of in the county of laborer, before the said felony and murder was committed, in form aforesaid, to wit, on the day of in the year of our Lord one thousand eight hundred and with force and arms, at in the county aforesaid, was accessory thereto before the fact, and did feloniously and maliciously incite, move, *procure*,

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[1] This indictment is framed upon the Stat. of Mass. 1804, c. 143, § 7. The section does not extend to accessories after the fact. But I see not why it is not an offence at common law, and have added the form of such a charge; both of which are taken from 1 Trem. P. C. 289, 290. R. S. c. 133. § 1. 4.

[2] 2 Chit. Cr. L. 5; Cr. Cir. Comp. 124 (6th Ed.); Mass. Laws, Stat. 1804, c. 123, § 1. The words of this statute against the accessory are "shall have been accessory thereto before the fact, by counselling, hiring, or otherwise procuring the same to be done." An indictment upon this statute ought to use these words only.

aid, *counsel*, *hire*, and command the said C. D. to do and commit the felony and murder aforesaid, in manner and form aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

14. *Another Precedent against an Accessory before the Fact in Murder.*[1]

[*After alleging the murder against the principal, in the usual form, upon the first section of the statute of Massachusetts*, 1804, c. 123, § 1, *the indictment proceeds.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that J. J. Knapp, of &c., and Geo. Crowinshield, of &c., before the said felony and murder was committed, in manner and form aforesaid, to wit, on at were accessory thereto before the fact, and *feloniously, wilfully, and of their malice aforethought*, did counsel, hire, and procure the said J. F. Knapp (*the principal*) the felony and murder aforesaid, in manner and form aforesaid, to do and commit; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

15. *Against an Accessory, for harboring a principal Felon in Murder.*[2]

[*Frame the indictment, against the principal felon, according to the facts in the case, and in the usual form; then go on.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., late of in the county of laborer, well knowing the said C. D. to have done, committed, and perpetrated the felony and murder in manner and form aforesaid, afterwards, to wit, on the day of in the year of our Lord, with force and arms, at aforesaid, in the county aforesaid, was accessory thereto, and him the said C. D. did then and there feloniously receive, harbor, comfort, conceal, and maintain; against the peace of said Commonwealth, and con-

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[1] This was the indictment used against the accessories before the fact, in the late case of *The Commonwealth* vs. *J. F. Knapp*, as principal, in the horrid and most diabolical murder of Joseph White; upon which J. J. Knapp was tried, convicted, and executed.

The words used in the English precedents are "feloniously and maliciously counsel him," &c. not using the allegation in the following precedent, "feloniously, wilfully, and of their malice aforethought." This indictment was drawn by the Attorney General of Massachusetts. R. S. c. 133. § 1.

[2] Archib. Cr. Pl. 397; 2 Stark. 456. R. S. c. 133. § 4. negative the consanguinity &c – "not standing in the relation of" &c 2. Ch. Gen. Pr. 157.

trary to the form of the statute in such case made and provided.[1]

16. *Indictment against an Accessory to a Murder after the Fact, upon the Statute of Massachusetts*, 1804, *c.* 123, § 2.

[*Frame the indictment against the principal, according to the facts in the case, and then go on.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., late of in the county of laborer, after the wilful murder was done and committed as aforesaid by him the said C. D., he the said A. B., then and there well knowing the same to have been done and committed by the said C. D. in manner and form aforesaid, afterwards, to wit, on at with force and arms, did become an accessory thereto after the fact, by knowingly receiving, harboring, comforting, concealing, maintaining, and otherwise unlawfully assisting the said C. D.; against the peace of said Commonwealth, and against the form of the statute in such case made and provided.

17. *Indictment against the Principal and Accessories before the Fact, in Burglary.*[2]

[*Draw the indictment against the principal according to the precedents in Burglary, (see Burglary, post,) and then proceed.*] And the jurors aforesaid, upon their oath aforsaid, do further present, that A. B., of in the county of laborer, before the committing of the felony and burglary aforesaid, in manner aforesaid, to wit, on the day of in the year of our Lord one thousand eight hundred and at aforesaid, in the county aforesaid, was accessory thereto before the fact, and did, feloniously and maliciously, incite, move, counsel, hire, and procure, aid, abet, and command the said C. D.[3] to do and commit the said felony and burglary, in manner and form aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

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[1] 2 Chitt. Cr. L. 6; Cro. Cir. Comp. 125, (6th Ed.); Mass. Laws, Stat. 1804, c. 123, § 2.

[2] 3 Chitt. 1101; Cro. C. C. 124, (6th Ed.); Cro. C. A. 27.

[3] The words in the statute of Massachusetts, 1805, c. 101, § 1, constituting the offence of being accessory before the fact, are, "by counselling, hiring, or procuring such burglary to be committed;" the same words as are used on a similar charge in the statute against murder.

18. *Indictment against an Accessory to a Burglary, after the Fact.*[1]

[*Draw the indictment against the principal according to the precedents in Burglary, (see Burglary, post,) and then proceed.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B. of   in the county of   laborer, afterwards, to wit, on   at   well knowing the said C. D. to have done and committed the felony and burglary aforesaid, in manner and form aforesaid, him the said C. D. did then and there knowingly harbor, conceal, maintain, and assist; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

19. *Indictment against an Accessory to a Burglary before the Fact, where the Principal committed Suicide before he was tried.*[2]

The jurors for said Commonwealth, upon their oath, present, that Thomas Daniels, lately resident in Boston, in the county of Suffolk, laborer, on the twenty-fifth day of November now last past, about the hour of ten in the night of the same day, with force and arms, at Stoneham, in the said county of Middlesex, the dwelling-house of Jacob Gould, there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of one David Gould, junior, in the said dwelling-house then and there being, feloniously and burglariously to steal, take, and carry away, and that he the said Thomas Daniels, then and there twenty pieces of silver coin, called dollars, of the value of twenty dollars, and six pieces of gold coin, called half eagles, of the value of thirty dollars, of the goods and chattels of the said David Gould, junior, then and there in the dwelling-house aforesaid being found, feloniously and burglariously did steal, take, and

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[1] Cro. C. C. 125, (6th Ed.)

[2] The prisoner in this case was acquitted upon the ground, that the principal had never been convicted. The fact was, that the principal committed suicide in prison before the commencement of the term at which he was to be tried, and therefore no conviction could ever be had. See 16 Mass. R. 423.

The gross injustice and absurdity of this principle of the common law is now universally acknowledged. It has always been condemned and even reprobated by many of the wisest and best judges that ever sat upon the English Bench. It is now abrogated in England, by a recent statute of 7 Geo. 4, c. 64, and in Massachusetts by a late statute of 1830, c. 19, in which the provisions of 7 Geo. 4, c. 64, are substantially adopted.

carry away; the said David Gould, junior, being then and there, at the time of breaking and entering the dwelling-house aforesaid by the said Thomas Daniels, lawfully therein, and he the said Thomas Daniels, being then and there at the time of breaking and entering the dwelling-house aforesaid by him the said Thomas Daniels, feloniously and burglariously armed with a certain dangerous weapon called a dagger, against the peace of said Commonwealth, and against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that James Phillips, lately resident in Boston, in the said county of Suffolk, laborer, before the committing of said felony and burglary in manner aforesaid, to wit, on the twentieth day of the same month of November now last past, at Stoneham aforesaid, in the county of Middlesex aforesaid, did feloniously and maliciously counsel, hire, and procure the said Thomas Daniels to do and commit the said felony and burglary, in manner and form aforesaid, against the peace of said Commonwealth, and against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that since the committing of the felony and burglary aforesaid, in manner aforesaid, by the said Thomas Daniels, to wit, on the twelfth day of December now last past, at Cambridge, in the county of Middlesex aforesaid, the said Thomas Daniels died by the act of suicide, and as a felon of himself, and that no trial or conviction of the said Thomas Daniels for the felony and burglary aforesaid, before the death of him the said Thomas Daniels, was ever prosecuted or had.

20. *Indictment against an Accessory to a Rape, before the Fact.*[1]

[*Draw the indictment against the principal, according to the precedents in Rape, (see Rape, post,) and then proceed.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., of   in the county of   laborer, before the committing of the felony and rape aforesaid, in manner aforesaid,

[1] There are no precedents against accessories to a rape, either in Chitty, Tremaine, Starkie, or Cro. Cir. Comp. But as rape is made felony by statute, it must have all the parts and ingredients of felony at common law. 1 Hale 631, 632; 3 Chit. C. L. 811. In Massachusetts, and probably in the other United States, accessories are expressly mentioned, and made punishable by statute. See Mass. Laws, stat. 1805, c. 97. See also Hawk. b. 1, c. 41, § 6; 4 Burr. 2179; Dall. c. 107; Hutt. 115.

to wit, on the day of in the year of our Lord one thousand eight hundred and at in the county aforesaid, was accessory to said felony and rape before the fact, and then and there did feloniously and maliciously counsel, hire, procure, and command the said C. D. *(the principal felon)* to do and commit the felony and rape aforesaid, in manner and form aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

21. *Against an Accessory to a Rape, after the Fact.*

[*Frame the indictment against the principal, according to the precedents in Rape, (see Rape, post,) and then proceed.* And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., of in the county of laborer, afterwards, to wit, on the day of now last past, with force and arms, at B aforesaid, in the county aforesaid, well knowing the said C. D. (*the principal felon*) to have done and committed the felony and rape aforesaid, in manner and form aforesaid, him the said C. D. did then and there knowingly harbor, conceal, maintain, and assist the said C. D. therein; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[2]

22. *Indictment against an Accessory before the Fact, to an Arson.*[3]

[*Frame the indictment against the principal according to the precedents in Arson, (see Arson, post,) and then proceed.*] And

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[1] The words of the statute of Massachusetts, creating the offence of accessory to a rape, before the fact, are, "by counselling, procuring, or commanding." This form, in which the English forms in other similar cases are adopted, includes these words of our statute and many more. It would therefore be good; but it would be more technical to use the words of the statute only.

[2] By the statute of Mass. 1805, c. 97, § 2, the penalty extends to an accessory after the fact, both as to the principal felon and also to the accessory before the fact. When, therefore, one is prosecuted as an accessory after the fact, to an accessory before the fact, the indictment must state the offence and conviction of the latter; for the form of which see *post*, "Rape," and then it must go on to allege the offence of the accessory after the fact, according to this and other precedents of this kind.

[3] There are no precedents against accessories in Arson, in Chitty, Starkie, Cro. Cir. Comp., or Tremaine. But Arson is a felony at common law; 1 Hawk. 165; 1 Hale, 556: and therefore there may be accessories in arson as in all

the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., of in the county of laborer, before the committing of the felony and arson aforesaid, in manner and form aforesaid, to wit, on at in the county aforesaid, did feloniously and maliciously counsel, hire, and procure the said C. D. to do and commit the said felony and arson, in manner and form aforesaid;[1] against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

23. *Against an Accessory after the Fact for harboring, &c. the Principal to an Arson, on the 5th Section of the Statute of Massachusetts*, 1804, *c.* 131.

[*Frame the indictment against the principal, accordimg to the precedents in Arson, and then proceed.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., of in the county of laborer, on the day of at B. aforesaid, in the county aforesaid, afterwards, to wit, on the day of at B. aforesaid, in the county aforesaid, well knowing the said C. D. to have done and committed the felony, arson, and offence aforesaid, did him the said C. D. then and there knowingly harbor, conceal, maintain, assist, and receive, after the felony, arson, and offence aforesaid was done and committed, in manner aforesaid, by him the said C. D.; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[2]

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other felonies. The statute of Massachusetts of 1804, c. 131, § 1, extends to accessories before, and § 5 to accessories after the fact. See also *Commonwealth* vs. *Barlow*, 4 Mass. R. 439; *Commonwealth* vs. *Macomber*, 3 Mass. R. 254; *Commonwealth* vs. *Newall et al.* 7 Mass. R. 245, as to accessories after the fact.

[1] The words of the statute of Massachusetts are "by counselling, hiring, or procuring the same to be done," § 1.

[2] A similar count may be drawn against an accessory after the fact, upon the same section of the statute, for harboring, concealing, &c. an accessory *before* the fact. In which case the conviction of the accessory must be technically alleged, and then you proceed, as above, against the accessory after the fact.

24. *Indictment against an Accessory to a Mayhem before the Fact.*[1]

[*Frame the charge against the principal, according to the precedents in Mayhem (see Maim, post,) and then proceed.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., of in the county of laborer, before the said maim was committed, in manner and form aforesaid, to wit, on the day of now last past, at in the county aforesaid, wilfully, maliciously, and unlawfully did counsel, hire, and procure the said C. D., (*the principal,*) the maim aforesaid, in manner and form aforesaid, to do and commit; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.*

ACCESSORY IN PIRACY before and after the fact.—See "Piracy," *post.*

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[1] Mass. Laws, statute 1804, c. 123, § 4; *Commonwealth* vs. *Newall et al.* 7 Mass. R. 245,—*post*, Maim.

[2] In drawing an indictment against an accessory to this offence, the particular species of maim, (of which there are a great variety,) of which the principal has been convicted, or is charged, must be minutely stated in the indictment against the accessory. The statute of Massachusetts, above quoted, is silent as to accessories after the fact. See *post*, Maim.

* Since the preceding precedents against accessories in felonies were written, the legislature of Massachusetts has followed the example of the English government, and abolished one of the most unjust and odious principles of the common law relative to the trial of accessories before and after the fact. By the statute of Massachusetts of 1830, c. 49, it is enacted, that an accessory "shall be deemed guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished." And the same provision is extended to accessories after the fact, in § 3 of the statute.

ADULTERY.

25. *Indictment for Adultery, by a Married Man with an Unmarried Woman.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of yeoman, on the day of in the year of our Lord one thousand eight hundred and at B. aforesaid, in the county aforesaid, did commit the crime of adultery with one C. D., of said B., spinster, by then and there having carnal knowledge of the body of her the said C. D., he the said A. B. being then and there a married man and having a lawful wife alive; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. 1. C. Mass. 245.

26. *For Adultery, by a Married Man with a Married Woman.*

The jurors &c., upon their oath present, that A. B., of in the county of yeoman, on the day of in the year of at B. aforesaid, in the county aforesaid, did commit the crime of adultery with one C. D., the wife of one E. F., by having carnal knowledge of the body of her the said C. D., he the said A. B. being then and there a married man, and having a lawful wife alive; and she the said C. D. being then and there a married woman, and the lawful wife of the said E. F.; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

Affray. See "Riot."

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[1] There are no precedents of indictments for adultery, in the English common law courts. It is an offence within the jurisdiction of the spiritual courts, and is proceeded with according to the rules of the canon law; 4 Bl. Com. 64. R. S. c. 130. §. 1.

ARSON, AND OTHER MALICIOUS BURNING.

27. *Indictment for Arson.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of now last past, about the hour of twelve in the night of the same day, at B. aforesaid, in the county aforesaid, the dwelling-house of one C. D. there situate, feloniously, wilfully, and maliciously did set fire to, and the same house then and there, by the kindling of such fire, did feloniously, wilfully, and maliciously burn and consume; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

28. *For setting Fire to a Building, whereby a Dwelling-house was burnt in the Night Time.*

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of now last past, about the hour of two in the night of the same day, at B. aforesaid, in the county aforesaid, a certain building of one C. D., there also situate, called a wood-house, feloniously, wilfully, and maliciously did set fire to and burn, and that by the kindling of said fire, and by the burning of said wood-house, the dwelling-house of one E. F., there also situate, was then and there, in the night time, feloniously, wilfully, and maliciously burnt and consumed; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

29. *For maliciously setting Fire to a Building adjoining a Dwelling-house, whereby a Dwelling-house was burnt.*

The jurors for said Commonwealth, upon their oath present, that A. B. of B., in the county aforesaid, laborer, on the day of now last past, about the hour of twelve in the night of the same day, at B. aforesaid, in the county aforesaid, a certain out-building, called a wood-house, of one C. D., there situate, and adjoining to the dwelling-house of him the said C. D.,

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[1] This and the six following precedents, are drawn upon the statute of Massachusetts of 1804, c. 131, but they conform to similar precedents in Starkie, Chitty, and the other authorities, containing precedents for these offences.

also there situate, feloniously, wilfully, and maliciously did set fire to, and that by the kindling of said fire, the said dwelling-house of him the said C. D. was then and there, in the night time, feloniously, wilfully, and maliciously burnt and consumed; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

30. *For maliciously burning a Stable within the Curtilage of a Dwelling-house.*

The jurors for said Commonwealth, upon their oath present, that A. B. of B., in the county aforesaid, laborer, on the day of now last past, about the hour of eleven, in the night of the same day, at B. aforesaid, in the county aforesaid, did wilfully and maliciously set fire to a certain stable[1] of one C. D., then and there situate, and being within the curtilage of the dwelling-house of him the said C. D., there also situate, and that by the kindling of such fire, the aforesaid stable, situate and being within the curtilage of said dwelling-house as aforesaid, was then and there, in the night time, wilfully and maliciously burnt and consumed; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

31. *For burning a Dwelling-house in the Day Time: On the Second Section of the Statute of Massachusetts of* 1804, c. 131, § 2.

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of now last past, with force and arms, at B. in the county aforesaid, the dwelling-house of one C. D. there situate, in the day time, did wilfully and maliciously set fire to and burn; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[2]

32. *For maliciously burning a Meeting-house: On the second Section of the Statute of Massachusetts of* 1804, c. 131.

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county aforesaid, laborer, on the

[1] The same allegation to be used for a barn or store, the two other buildings mentioned in the second section of the statute.

[2] If the fire was set to an out-building adjoining the dwelling-house, or to any other building whereby the dwelling-house was burnt, the facts must be alleged as in precedents No. 28 and 29.

day of now last past, at B. aforesaid, in the county aforesaid, a certain meeting-house there situate, belonging to the first parish in the said town of B., and erected for public uses, to wit, for the public worship of Almighty God, did then and there wilfuily and maliciously set fire to, and that by the kindling of such fire the said meeting-house was then and there, in the night time, wilfully burnt and consumed; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

33. *For maliciously burning a Vessel, lying within the body of the County: On the third Section of the Statute of Massachusetts of* 1801, *c.* 131.

The jurors for said Commonwealth, upon their oath present, that A. B. of B., in the county aforesaid, laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, a certain vessel, called the being the property of one C. D., then and there lying and being at B. aforesaid, and within the body of the said county of did wilfully and maliciously set fire to, burn, and consume; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[2]

34. *Another Precedent for Arson.*[3]

[*Caption and Commencement as in Precedent, No.* 1.]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of now last past, at in the county aforesaid, a certain house [4] of one C. C. there situate, feloniously, wilfully,

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[1] The same form is to be adopted as to the other public buildings, mentioned in the second section of the statute, alleging for what public use they were erected; as, "a court-house, belonging to the county of B., and erected for public use, to wit, for transacting the judicial business, and for holding the judicial courts for said county of B."

[2] The same form as the preceding may be adopted in all the cases mentioned in the third and fourth sections of the statute, varying the allegation as to the name of the building, or article burnt, according to the fact, and describing the same in the *identical words* of the statute.

[3] Taken from Stark. Cr. Pl. 417.

[4] Not necessary to allege it a *dwelling-house*, but the building ought to be described in the words of the statute. Stark. Cr. Pl. 417, note (m.) and the cases there cited, *viz.* 1 Hale, 567, 570; 3 Inst. 67; 1 Hawk. c. 39, § 1; East, P. C. 1034; also 3 Chitt. C. L. 1107.

and maliciously did set fire to, and the same house then and there, by such firing as aforesaid, feloniously, wilfully, and maliciously did burn and consume; against the peace of said Commonwealth, and against the form of the statute in such case made and provided.

35. *For burning his own House with intent to defraud the Insurers.*

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of yeoman, on the day of in the year of our Lord &c. (feloniously,) wilfully, maliciously, and unlawfully did set fire to a certain dwelling-house, being the property and in possession of him the said A. B., and the same dwelling-house, by such firing, did then and there burn and consume, with intent thereby a certain corporation, called *The Massachusetts Mutual Fire Insurance Company*,[1] to injure and defraud; against the peace and dignity of said Commonwealth, and contrary to the form of the statute in such case made and provided.[2]

36. *For setting Fire to a Gaol.*

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of B., laborer, on the day of now last past, at in the county aforesaid, a certain building there situate, called a gaol, (the same being then and there the prison and common gaol of the said county of B.) the property of the inhabitants of the said county of B., and then and there erected for public use, to wit, for the use and purpose of a public and common gaol and prison, for the confinement and imprisonment of prisoners lawfully committed to the same, did then and there wilfully and maliciously set fire to; and that the same building, by the kindling of such fire, was then and there wilfully and maliciously, in the night time, burnt and consumed; against the peace and dignity of said Commonwealth, and contrary to the form of the statute in such case made and provided.[3]

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[1] The corporate name to be truly and correctly inserted.

[2] This precedent is taken from Stark. Cr. Pl. 420, and is drawn upon the statute of 43 Geo. 3, c. 58, § 1. There may be, and if not, *there ought to be*, similar statutes in this country. *Quære.* Is it not an offence at common law? This precedent concludes at common law as well as upon the statute.

[3] There is a precedent similar to this in Stark. Cr. Pl. 422, and another in 3 Chitt. C. L. 1110. I have altered them, by adding a more particular de-

37. *For a Misdemeanor at Common Law, in setting Fire to Defendant's own House, contiguous to others; to the public Alarm, &c.*

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, unlawfully and maliciously devising and intending to set on fire and burn a certain house belonging to him the said A. B., situated in aforesaid, in the county aforesaid, on the day of in the year of our Lord, &c. at aforesaid, in the county aforesaid, unlawfully, wickedly, and maliciously did set fire to a certain part of the wooden floor of and belonging to said house, which said house was then and there contiguous and near to certain dwelling-houses of and belonging to divers other citizens of the Commonwealth, situate in the town of aforesaid, with a wicked intention, by means of such setting fire to the wooden floor aforesaid, belonging to said house of him the said A. B., then and there unlawfully, wilfully, and maliciously to set on fire and burn the said house of him the said A. B., to the great damage, danger, fear, and terror of all the citizens of said Commonwealth, near the house of the said A. B., then and there inhabiting, residing, and dwelling, and against the peace and dignity of the Commonwealth aforesaid.[1]

38. *For a Misdemeanor at Common Law against a Lodger, for setting Fire to the Wainscot of her Room, with Intent to burn the other Rooms.*[2]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of widow, on the day of &c., at aforesaid, in the county aforesaid, unlawfully, wilfully, and maliciously did set fire to the wainscot of and belonging to a certain room, then being in the occupation of her the said A. B., and then being part and parcel of the dwelling-house of one C. D. there situate, and which said dwelling-house there was contiguous and adjoining to certain other dwelling-houses of and belonging to divers citizens of this Commonwealth, with a wicked in-

scription of the building. The precedent in Starkie is at common law. I have concluded this precedent both at common law and on the statute. A gaol, though not particularly mentioned in the statute of Massachusetts, as a building erected for public use, may be considered as such a building, and has been so considered in a case at *nisi prius* in the Supreme Court of Massachusetts, per *Sedgwick* J.

[1] 3 Chitt. C. L. 1111.

[2] Chitt. C. L. 1112, refers to a similar precedent in 4 Wentworth, 59.

tention, by means thereof, then and there, unlawfully, wilfully, and maliciously to burn and consume the said room, and two other rooms then and there being in the occupation of her the said A. B., and which said last mentioned rooms, then were part and parcel of the dwelling-house of him the said C. D., to the great damage of the said C. D., to the great danger, fear, and terror of all the citizens of said Commonwealth near the dwelling of the said C. D. then and there inhabiting and dwelling, and against the peace and dignity of the Commonwealth aforesaid.

ASSAULTS.

39. *For an Assault not accompanied with a Battery.*

[*Caption and commencement as in precedent No* 1.]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on with force and arms, at in the county aforesaid, in and upon one C. D., [in the peace of the said Commonwealth then and there being,[1]] with a certain offensive weapon called a cane, did make an assault, and other wrongs to the said C. D. then and there did and committed, to the great injury of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

40. *For a common Assault and Battery.*

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on with force and arms, at in the county aforesaid, in and upon the body of one C. D., [in the peace of the said Commonwealth then and there being,[1]] an assault did make, and him the said C. D. did then and there beat, abuse, wound, and ill treat,[2] and other wrongs, then and there did and committed, to the great

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[1] These words are not necessary, and are not always used. See 3 Chitt. C. L. 821, note (c.) ; Cro. C. C. 150 (6th Ed.) note (b).

[2] The words "so that his life was greatly despaired of" are usually inserted in the English precedent; they ought to be omitted, unless the battery is greatly aggravated ; in all cases the allegation ought to be according to the fact. 3 Chitt. C. L. 821, note (d.)

damage of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

41. *For an Assault and Battery, by casting a Person on a Brick Floor, kicking, &c.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of with force and arms, at aforesaid, in the county aforesaid, in and upon the body of one C. D., [in the peace of said Commonwealth then and there being,] did make an assault, and him the said C. D. did then and there beat, wound, and ill treat; and that the said A. B. with both his hands, did then and there violently cast and throw the said C. D. upon and against a certain brick floor there, and him the said C. D., in and upon his head, breast, back, sides, and other parts of his body, with the feet of him the said A. B., then and there violently and cruelly did kick, strike, and beat; giving to the said C. D. then and there, as well by such casting and throwing of him the said C. D. as also by such kicking, striking, and beating of him the said C. D. as aforesaid, in and upon the head, breast, back, and sides of him the said C. D., divers bruises and wounds, and other wrongs then and there did and committed, to the great damage of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

42. *For an Assault, and beating out an Eye.*[2]

The jurors &c. upon their oath present, that A. B., of in the county of widow, [being a person of depraved and malicious disposition,] on the day of with force and arms, at aforesaid, in the county aforesaid, in and upon one C. D., violently did make an assault, and her the said C. D. did then and there beat, wound, and ill treat, and that she the said A. B. with her right hand, the said C. D. in and upon the left eye of her the said C. D., then and there unlawfully, violently, and maliciously did strike; by means whereof the said C. D., then and there, the use, sight, and benefit of her said left eye entirely lost and was deprived of; and also by means of the premises, she, the said C. D., became weak and sick, and

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[1] 3 Chitt. C. L. 821, 822, who refers to similar precedents in Cro. C. C. and Stark. 391.

[2] 3 Chitt. Cr. L. 822, and the precedents there quoted from Stark. and Cro. C. C. 143 (6th Ed.); Stark. 388.

remained so weak and sick, from thence, until the day of taking this inquisition, and other wrongs then and there did and committed, to the great damage of the said C. D., and against the peace and dignity of the Commonwealth aforesaid.[1]

43. *For an Assault, and tearing the Hair off Prosecutor's Head.*

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county aforesaid, laborer, on with force and arms, at in the county aforesaid, in and upon the body of one C. D. [in the peace of the said Commonwealth then and there being],[2] did make an assault, and her the said C. D. did then and there beat, wound, and abuse; and that he the said A. B. did then and there unlawfully, violently, and cruelly seize and lay hold of the said C. D. by the hair of her head; and did then and there with great force, wrath, and violence, pull and drag the said C. D. by the same; by means whereof he the said A. B. did then and there unlawfully, cruelly, and brutally pull and tear the hair of the head of her the said C. D. off by the roots; and the head of her the said C. D. was thereby grievously wounded and hurt, and the said C. D. thereby put in great pain and torture; and other wrongs then and there did and committed, to the great damage of her the said C. D., and against the peace and dignity of the Commonwealth aforesaid.[3]

44. *For an Assault with a Cane.*

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county aforesaid, laborer, on the day of with force and arms at B. aforesaid, in the county aforesaid, in and upon one C. D. did make an assault, and him the said C. D. with a large cane, which the said A. B. in his right hand then and there had and held, did strike divers grievous and dangerous blows upon the head, back, and shoulders, and other parts of the body of him the said C. D., whereby the said C. D. was grievously and dangerously beaten, bruised, and wounded, and his life endangered; and other wrongs then and there did and committed, to the great damage of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

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[1] Add a count for a common assault as in precedent No. 40.

[2] These words are not necessary. Se *ante*, precedent No. 39, note (1.)

[3] See a similar precedent in 3 Chitt. C. L. 822; Cro. C. C. 144 (6th Ed.)

45. *For assaulting the Driver of a Chaise, and overturning the Chaise with the Wheel of a Cart.*

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on with force and arms, at B., in the county aforesaid, in and upon one C. D. did make an assault; he the said C. D. being then and there in a certain chaise drawn by one horse, and in the public street and common highway there; and that he the said A. B., then and there driving a horse drawing a cart, did, in the highway aforesaid, unlawfully, violently, wantonly, and maliciously drive said horse, so as aforesaid drawing said cart, to and against the chaise aforesaid; and that by such driving, did then and there in the highway aforesaid unlawfully, wantonly, and maliciously force said cart against the said chaise, and thereby overturn the said chaise in which the said C. D. then was as aforesaid, with one of the wheels of said cart; by means whereof, he the said C. D. was then and there grievously hurt, bruised, and wounded; and other wrongs then and there did and committed, to the great damage of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

46. *For an Assault by driving a Coach against Prosecutor's Chaise.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of coachman, on with force and arms, at B. aforesaid, in the county aforesaid, in and upon the bodies of one C. D. and one E. F., an assault did make, and in the highway there, unlawfully, wilfully, and furiously did drive four horses, then and there drawing a certain stage-coach, under the care and guidance of him the said A. B., in the highway aforesaid, towards and against a certain four-wheel chaise, then and there drawn by one horse, in the highway aforesaid, wherein the said C. D. and E. F. were then and there respectively passing and travelling in the highway aforesaid; and that the said A. B. by such driving of the said four horses so drawing the said coach, then and there unlawfully, wilfully, wantonly, and maliciously did overturn, break, and destroy the said four-wheel chaise, and forced and threw the said C. D. and E. F. from and out of the said four-wheel chaise, into and upon the highway aforesaid; by means whereof the said C. D.

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[1] 3 Chitt. C. L. 824.

and E. F. were severally grievously hurt, bruised, and wounded, and put in great danger of losing their lives; and other wrongs the said A. B. then and there unlawfully, wilfully, and maliciously did and committed, to the great damage of them the said C. D. and E. F., and against the peace and dignity of the Commonwealth aforesaid.

47. *For an Assault, and driving a Cart against a Chaise, and throwing the Driver therefrom.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on with force and arms, at in the county aforesaid, in and upon one C. D. in the public highway there did make an assault, and then and there did wilfully, unlawfully, wantonly, and violently drive and force a certain horse and cart, under the care and guidance of him the said A. B., to, at, and against a certain chaise drawn by two horses, under the care of the said C. D., and in which the said C. D. then was, in the highway aforesaid. By means whereof the said C. D. was then and there thrown from and out of the said chaise, to and against the ground, and was thereby greatly injured and bruised, and put in great peril and danger of his life; and other wrongs then and there did and committed, to the great damage of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

48. *For an Assault and encouraging a Dog to bite.*[2]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county aforesaid, laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, in and upon one C. D. an assault did make, and him the said C. D. did then and there beat, wound, and abuse, and that he the said A. B. did then and there unlawfully incite, provoke, and encourage a certain dog, belonging to him the said A. B., him the said C. D. then and there to beset and bite; by means whereof the same dog did then and there grievously bite the right leg of him the said C. D., whereby the said leg of him the said C. D. was grievously hurt and wounded, and his life greatly en-

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[1] 3 Chitt. C. L. 825, said to be a recent form, settled by counsel, (but there is no assault alleged, and no other personal injury to the prosecutor stated, except his fears &c.) A second count for a common assault may be added, as *ante*, precedent No. 40.

[2] 3 Chitt. Cr. L. 823; Cro. C. C. 145 (6th Ed.); Stark. 389; 1 Trem. 240, 241.

dangered; and other wrongs to the said C. D. then and there did and committed, to the great damage of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

49. *For assaulting a Woman pregnant with a quick Child.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one C. D., the wife of one E. F., did make an assault; she the said C. D. being then and there pregnant with a quick child; and her the said C. D. did then and there beat, wound, and abuse, so that her life was thereby greatly endangered; by reason whereof she the said C. D. afterwards, to wit, on the day of in the same month of at B. aforesaid, did bring forth the said child, dead; and other wrongs to the said C. D. then and there did and committed, to the great damage of her the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

50. *For riding over a Person with a Horse.*[2]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of at B. aforesaid, in the county aforesaid, in and upon the body of one C. D. an assault did make, and him the said C. D. did then and there beat, wound, and abuse; and that the said A. B. did then and there, unlawfully, maliciously, and with great force and violence, ride and drive a certain horse, then and there under the guidance and command of him the said A. B., against, upon, and over the body of the said C. D., whereby the said C. D. was then and there grievously wounded and bruised, and his life thereby greatly endangered; and other wrongs then and there did and committed, to the great damage of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

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[1] 3 Chitt. Cr. L. 831; Cro. C. C. 138; Stark. 386.

[2] 3 Chitt. Cr. L. 823; Davis's Just. 275 (1st Ed.) from which this precedent is in substance taken.

51. *For an Assault, and presenting a loaded Gun, and threatening to fire it.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, in and upon one C. D. an assault did make, [and him the said C. D. did then and there beat and abuse,] and that he the said A. B. did then and there level and point at the body of him the said C. D. a certain gun, which he the said A. B. in both his hands then and there had and held, loaded with gunpowder and leaden balls; and did then and there, with the gun aforesaid so loaded, levelled, and pointed at the body of the said C. D., threaten to shoot the said C. D., and did thereby greatly terrify and frighten the said C. D. and endanger his life; and other wrongs then and there did and committed, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

52. *For an Assault, and forcibly taking away a Receipt for a Debt.*[2]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the body of one C. D. an assault did make, and him the said C. D. did beat and ill treat; and that he the said A. B. then and there unlawfully, violently, and injuriously did seize and take from and out of the custody of him the said C. D., and against his will and consent, a certain receipt, [*here describe the receipt as accurately as possible,*] and the same receipt the said A. B. then and there unlawfully and wilfully did withhold from the said C. D., and keep in his the said A. B's possession; and other wrongs then and there did, to the great damage of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.[3]

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[1] There is a similar precedent in 3 Chitt. C. L. 826. It is therein alleged, that defendant "beat and wounded prosecutor so that his life was greatly despaired of." The offence, as described in the close of Chitty's precedent, is nothing more than an *assault* with a loaded gun. See a similar precedent in 4 Went. 70.

[2] 3 Chitt. Cr. L. 827, refers to a similar precedent in Went. 437.

[3] If the receipt had been taken by the consent of the owner, but had been fraudulently obtained, with a design, existing at the time, of withholding and detaining it, it would have amounted to a larceny.

53. *For a violent Assault and wounding Prosecutor, with a Bayonet.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of now last past, with force and arms, at aforesaid, in the county aforesaid, in and upon one C. D. violently, wickedly, and maliciously did make an assault, and him the said C. D. did then and there beat, wound, and ill treat, so that his life was then and there greatly endangered, and that the said A. B., with a certain drawn weapon called a bayonet, which was then and there affixed to a certain musket, which he the said A. B. in both his hands then and there had and held, in and upon the said C. D. did make an assault, and did give to him the said C. D. one dangerous and grievous stroke and wound, in and upon the left side of the head of him the said C. D., of the length of one inch, and of the depth of two inches; by means whereof the said C. D. was then and there put in great danger and peril of his life, and did then and there labor under great pain and anguish for the space of days; and other wrongs then and there did and committed, to the great damage of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

54. *For an Assault and False Imprisonment.*[2]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one C. D. did make an assault, and him the said C. D. did then and there beat, abuse, and ill treat; and him the said C. D. then and there unlawfully and injuriously, against the will and without the consent of him the said C. D., and without any legal warrant, authority, or justifiable cause whatever, did imprison, detain, and hold in duress for the space of hours then next following; and other wrongs and injuries then and there did and committed, to the great damage of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

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[1] 3 Chitt. Cr. L. 826. This precedent is said to have been taken from Mr. J. Asher's paper book, vol. 24, p. 163. I have rejected what I consider the superfluous matter in this precedent.

[2] Stark. Cr. Pl. 385, 399; Cro. C. C. 135 (6th Ed.) The allegation in both these precedents, "that his life was greatly despaired of," is omitted.

55. *For the same Offence, and obtaining Money for discharging the Prosecutor.*[1]

The jurors &c. [*the same as in the next preceding precedent; then add*] and until he the said C. D. had paid him the said A. B. the sum of dollars, of the monies of him the said C. D., for his enlargement; and other wrongs &c.

56. *For the same, and for obtaining a Note for discharging the Prosecutor.*

The jurors &c. [*as in precedent No.* 54; *then add*] and until he the said C. D., for his delivery from said imprisonment, had signed and given to the said A. B. a note under the hand of the said C. D., whereby he the said C. D. promised to pay to the said A. B. the sum of twenty dollars; and other wrongs &c.[2]

57. *For entering a public House, making a Noise therein, (assaulting,) and threatening the Owner with bodily harm.*[3]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, unlawfully did enter into the dwelling-house of one C. D. there situate, (the same being licensed according to law as a tavern, and in which divers citizens of the said Commonwealth were then and there peaceably met and assembled,) with intention to disturb the peace of the said Commonwealth; and that the said A. B., so being in the said dwelling-house, did then and there, unlawfully, wilfully, injuriously, and obstinately, remain there for the space of one hour and more, without the license and against the will of the said C. D., and did then and there unlawfully, obstinately, and injuriously refuse to depart and go out of the said dwelling-house, upon the reasonable request of the said C. D., then and there made to him for that purpose; and that the said A. B. did then and there unlawfully, vehemently, and turbulently menace and threaten great bodily harm to the said C. D., then and there being in his said dwelling-house, and did then and there make a great noise, in disturbance of the peace of said Commonwealth, and greatly misbehave himself in the same dwelling-house; against the peace and dignity of said Commonwealth. [*Add a count for a common assault.*]

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[1] Stark. 385. [2] Ibid. 386. [3] Stark. Cr. Pl. 396.

ASSAULTS UPON OFFICERS.

58. *For an Assault upon a Constable, in the execution of his Office.*[1]

The jurors of said Commonwealth, upon their oath present, that A. B., of in the county of yeoman, on the day of now last past, with force and arms, at aforesaid, in the county aforesaid, in and upon the body of one C. D., he the said C. D. being then and there a constable of the said town of legally authorized and duly qualified to discharge and perform the duties of said office, and being then and there in the due and lawful exercise of the same, did make an assault, and him the said C. D. did then and there beat, abuse, and ill treat; and in the due and lawful execution of his said office, did then and there unlawfully and knowingly obstruct, hinder, and oppose; and other wrongs then and there did and committed, to the great damage of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

59. *For an Assault upon a Collector of a Turnpike Corporation in the execution of his Office.*[2]

The jurors for said Commonwealth of Massachusetts, upon their oath present, that A. B., of B., in the county of yeoman, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one C. D., he the said C. D. being then and there one of the collectors and receivers of the monies and toll payable by virtue of a certain act or law of this Commonwealth, made and passed in the year of our Lord one thousand eight hundred and intitled "an act," [*here insert the title of the act of incorporation correctly,*] and being then and there in the due and lawful execution of the said office of collector and receiver of such monies and toll, did make an assault, and him the said C. D. did then and there beat, wound, and abuse; and other wrongs then and there did and committed, to the great damage of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

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[1] See similar precedents, Cro. C. C. 134, (6th Ed.); Stark. 385; 3 Chitt. 832. This precedent is more full than those above referred to. A second count for a common assault may be added. See note to precedent No. 61, *post.*

[2] See similar precedents in 3 Chitt. 832; Stark. 387; Cro. C. C. 139, (6th Ed.)

60. *For an Assault on a Deputy Gaoler, in the execution of his Office.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on with force and arms, at aforesaid, in the county aforesaid, in and upon one C. D., he the said C. D. then and there being a deputy keeper of the Commonwealth's gaol in the said town of and county aforesaid, and then and there having the custody of divers persons lawfully confined as prisoners in said gaol, and being then and there in the lawful execution of his said office and duty of deputy keeper of said gaol, did make an assault, and him the said C. D. did then and there beat, wound, and abuse; and other wrongs to the said C. D. then and there did and committed; against the peace and dignity of the Commonwealth aforesaid. *(Add a count for a common assault.)*

61. *For an Assault upon a Minister of the Gospel, whereby he was rendered incapable of discharging his Duty.*[2]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of yeoman, on at in the county aforesaid, with force and arms, in and upon one C. D., being then and there a settled and ordained minister of the gospel, in the said town of B., an assault did make, and him the said C. D. did then and there beat, wound, and ill treat; and that he the said A B., with both his fists, did strike divers grievous and dangerous blows upon the head, face, and other parts of the body of him the said C. D., whereby he was grievously and dangerously wounded and bruised; by means whereof the said C. D. became sick and debilitated for the space of days next ensuing, and during all that time suffered great bodily pain and anguish; and was also thereby prevented from, and rendered incapable, during all the time last mentioned, of officiating in, and performing the duties of his office and function, as a settled minister of the gospel in the

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[1] Stark. 398.

[2] 3 Chitt. Cr. L. 827, 828; Cro. C. A. 266, 407.

These forms may be adopted, *mutatis mutandis*, for assaults upon all other officers, as sheriffs, coroners, &c. Upon all indictments for assaults upon officers, the party may be found not guilty of assaulting the officer in the execution of his office, but guilty of a common assault, according to the nature of the evidence.

said town of and other wrongs then and there did and committed, to the great damage of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid. *(Add a second count, leaving out the allegation that he was prevented from officiating, &c., and a third count for a common assault and battery.)*

ASSAULTS, WITH A FELONIOUS INTENT.

62. *For an Assault, with intent to maim.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of yeoman, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the body of one C. D., did make an assault, he the said A. B. being then and there armed with a dangerous weapon, called a knife, which he the said A. B. in his right hand then and there had and held, with an intention him the said C. D. with set purposes and aforethought malice unlawfully to maim and disfigure, by unlawfully cutting off the left ear of him the said C. D., against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

63. *For a felonious Assault, with a drawn Sword, with intent to murder.*[2]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on

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[1] This precedent is drawn upon the fourth and fifth sections of the statute of Massachusetts of 1804, c. 123. See also *Commonwealth* v. *Newell et al.*, 7 Mass. R. 245, in which it is decided that Mayhem is no felony, either at common law or by the above mentioned statute. It is not, therefore, by that statute, a *felonious* assault.

This precedent may be used for all the different species of Maiming, making the charge conformable to the fact, as, "putting out an eye," "cutting off or disabling a limb," &c.

[2] See similar precedents in 3 Chitt. Cr. L. 828, 829; Cro. C. C. 140, 141, (6th Ed.); Stark. 387, 388.

The party may be acquitted upon this indictment of the felonious intent, and found guilty of a common assault. This form will, of course, answer in all

with force and arms, at in the county aforesaid, in and upon one C. D., with a dangerous weapon, to wit, with a drawn sword, with which he the said A. B. was then and there armed, and which he the said A. B. in his right hand then and there had and held, did make an assault, with an intention him the said C. D., with the drawn sword aforesaid, then and there feloniously, wilfully, and of his malice aforethought, to kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

64. *For a felonious Assault, and casting into a Pond, with intent to suffocate and drown.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on with force and arms, at in the county aforesaid, in and upon the body of one C. D., with a dangerous weapon, to wit, with a large stick, which he the said A. B. in both his hands then and there had and held, did make an assault, and him the said C. D. did then and there beat, wound, and abuse; and that he the said A. B., with both his hands, did then and there unlawfully, violently, and maliciously cast, push, and throw the said C. D. into a certain pond there situate and being, wherein there was a large quantity of water, and did then and there keep, press down, and confine the said C. D. in and under the said water, for the space of five minutes, with intention him the said C. D. then and there feloniously, wilfully, and of his malice aforethought, to suffocate and drown in the said water; and him the said C. D., by means thereof, wilfully, feloniously, and of his malice aforethought, to kill and murder; and other wrongs to the said C. D. then and there did, to the great damage of him the said C. D.; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

65. *For a felonious Assault, with intent to commit a Rape.*[2]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on

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other cases of felonious assault with dangerous weapons, varying the description of the weapon, according to the fact; as, "with a certain dangerous weapon called a pistol, loaded with gun-powder and leaden bullets."

[1] See other precedents, 3 Chitt. Cr. L. 829; Stark. 392.

[2] See similar precedent, Cro. C. C. 136, (6th Ed.)

with force and arms, at in the county aforesaid, in and upon the body of one C. D. did make an assault, and her the said C. D. did then and there beat, wound, and abuse, with intent her the said C. D. then and there feloniously to ravish and carnally know, *by force*,[1] and against her will; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

66. *For a felonious Assault, with Intent carnally to know and abuse a Female Child under the Age of ten Years.*

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of now last past, with force and arms, at aforesaid, in the county aforesaid, in and upon one C. D., a woman child under the age of ten years, to wit, of the age of eight years, did make an assault, and her the said C. D. did then and there beat, abuse, and ill treat, with intent her the said C. D. wickedly and feloniously to carnally know and abuse; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

67. *For a felonious Assault upon a Woman, by two Persons, with intent that one of them should ravish her.*[2]

The jurors for said Commonwealth, upon their oath present, that A. B. and C. D., both of in the county aforesaid, laborers, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the body of one E. F. did make an assault, and her the said E. F. did then and there beat, wound, and abuse, with an intent that he the said C. D. should then and there feloniously ravish and carnally know her the said E. F. by force and against her will; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

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[1] The words "*by force*" are not used in the English precedents, but they are a part of the definition of the crime. Hawkins's definition is "an offence in having carnal knowledge of a woman, *by force and against her will.*" Hawk. B. 1, c. 41, § 1. The statute of Massachusetts 1805, c. 97, adopts the same definition.

[2] Cro. C. C. 137, (6th Ed.)

68. *For an Assault with intent to rob.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one C. D., with a certain dangerous weapon called a pistol, then and there loaded with gunpowder and leaden bullets, with which he the said A. B. was then and there armed, and which he the said A. B. in his right hand then and there had and held, and also with other actual violence, did make an assault, with intent the monies, goods, and chattels of him the said C. D., from the person and against the will of him the said C. D., feloniously and by force and violence, and by assault and putting him in bodily fear and danger of his life, to steal, take, and rob; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

69. *For an Assault upon a Boy, with Intent to commit the Crime against Nature.*[2]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of now last past, with force and arms. at B. aforesaid, in the county aforesaid, in and upon the body of one C. D., a male child, of the age of eight years, did make an assault, and him the said C. D. did then and there beat, wound, and abuse, with an intent the horrid, detestable, and sodomitical crime against the order of nature, with him the said C. D. then and there feloniously to do and commit, by having a venerial affair with the said C. D., and by then and there having carnal knowledge of the body of him the said C. D.; against the peace of said Commonwealth, and against the form of the statute in such case made and provided.

70. *For an Assault, with Intent to steal from the Person.*[3]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of June now last past, with force and arms, at B. aforesaid,

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[1] Mass. Laws, stat. 1804, c. 143, § 9. There is a precedent in Starkie, and another in Cro. C. C. for this offence, each of which has been decided to be defective. See Stark. 404, and Cro. C. C. 152, 153, note (a.)

[2] Altered from Stark. 387, 409.

[3] Mass. Stat. 1804, c. 143, § 8, 9.

in the county aforesaid, in and upon the body of one C. D., with a dangerous weapon, to wit, with a pistol, did make an assault, and him the said C. D. did then and there beat, wound, and abuse, with intent the monies, goods, and chattels of him the said C. D., from the person of him the said C. D., openly and violently [*or privily and fraudulently, as the case may be*] to steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

BARRATRY.

71. *Indictment for being a common Barrator.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county aforesaid, yeoman, on the day of in the year of our Lord one thousand eight hundred and twenty, and on divers other days and times, as well before as afterwards, was, and yet is, a common barrator,[2] and that he the said A. B., on the said day of and on divers other days and times, as well before as afterwards, at aforesaid, in the county aforesaid, divers quarrels, strifes, suits, and controversies, among the honest and quiet citizens of the said Commonwealth, then and there did move, procure, stir up, and excite; against the peace and dignity of the Commonwealth aforesaid.

72. *Against an Attorney, for suing a Person in the Name of one who was ignorant of, and had no Interest in the Suit.*[3]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county aforesaid, gentleman, on the day of in the year of at B., in the county aforesaid, being then an attorney of the Court of Common Pleas for the said county of duly admitted, sworn, and authorized to practise as an attorney of said court, had in his

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[1] 2 Chitt. 113; Trem. P. C. 224; Cro. C. C. 178, (6th Ed.)

[2] These words are absolutely necessary, and cannot be supplied by others of the same signification. 3 Chitt. C. L. 234, note (q); 6 Mod. 311; 2 Saunders, 308, note (1); 1 Sid. 282.

[3] See 4 Black. Com. 134. Blackstone refers to no authority for the law laid down in the passage here quoted.

custody and possession a certain promissory note of hand, bearing date &c. [*here insert a copy, or the substance of the note,*] and that he the said A. B. did then and there, unlawfully and fraudulently, and with a design to injure and oppress one C. D., commence an action at law upon the aforesaid promissory note of hand, to the Court of Common Pleas then next to be holden at within and for the said county of on the Tuesday of in the year of our Lord one thousand eight hundred and against the said C. D., as the maker of said note, in the name of one E. F., of &c. without the knowledge, privity, or consent of him the said E. F., and without any power or authority from him therefor; he the said E. F. then and there having no interest, property, or concern in the said note, either as endorser thereof, or in any other way or manner whatever; and he the said A. B. the aforesaid action, so as aforesaid unlawfully and fraudulently commenced, did unlawfully, fraudulently, and vexatiously prosecute to final judgment and execution, with intent him the said C. D. to injure, harass, and oppress, and also with intent unlawfully and oppressively to inhance and augment the cost to be taxed for the benefit of him the said A. B. in the suit and action aforesaid, in violation of his duty as an attorney of the said Court of Common Pleas, to the great injury and oppression of the said C. D., and against the peace and dignity of the Commonwealth aforesaid.[1]

73. *Against an Attorney for advancing Money to procure himself to be retained, in the Collection of a Note.*[2]

The jurors for said Commonwealth, upon their oath present, that A. B., of &c., on &c., at &c., being then an attorney of the Court of Common Pleas for the said county of duly admitted, sworn, and authorized to practise as as attorney of said court, did then and there loan and advance to one C. D. the sum of dollars, with intent thereby to procure himself

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[1] Judgment was rendered at *nisi prius* upon an indictment, from which this precedent is taken, in the Supreme Judicial Court of Massachusetts, in the county of Suffolk.

[2] On the statute of Massachusetts of 1811, c. 62, prohibiting attornies and other officers of the government, magistrates, sheriffs, &c. from purchasing notes and other demands, for the purpose of making gains in the collection thereof. This statute consists of but one section; but it creates (as it is said) more than twenty distinct offences! The penalties are to be recovered by indictment, "or by action."

to be retained as an attorney in the collection of a certain note of hand hereafter mentioned, and with intent thereby to procure and obtain of him the said C. D. a certain promissory note for the payment of money, made and given by one E. F. to [*here set forth the note in substance and to the purport of the same*,] for the intent and purpose of making to himself gain and profit, from the writs and fees arising in the collecting thereof, by a suit at law; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

BASTARD.

74. *Indictment against a Woman for concealing her Pregnancy.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of   in the county of   spinster, on the   day of   now last past, at   aforesaid, in the county aforesaid, being then and there pregnant with a *male*[2] child, did then and there conceal her pregnancy, and was then and there willingly delivered in secret by herself of the said *male* child, the issue of her body; which child, by the laws of this Commonwealth, was a bastard; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

75. *Against a Woman for concealing the Death of a Bastard Child.*

The jurors for said Commonwealth, upon their oath present, that A. B., of   in the county of   spinster, on the   day of   now last past, at B., in the county aforesaid, being then and there pregnant with a *male* bastard child, did bring forth the said child, of the body of her the said A. B., and was then and there willingly delivered thereof, *alone*,[3] and

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[1] This and the following precedent are drawn upon the statute of Massachusetts of 1784, c. 42, § 1. They are precisely the same as have been adopted and used in the Supreme Court of Massachusetts since the passing of the statute.

[2] The sex is material to be averred; Stark. 383, note (f.)

[3] This word is not necessary; Stark. 383, note (h.) But the words "in secret by herself" are made necessary by the first section of the statute last before referred to.

in secret by herself; which said child, so being born, and so being the issue of the body of the said A. B., if it were born alive, was, by the laws of this Commonwealth, a bastard; and that she the said A. B. did then and there endeavour, privately by herself, [*or by the procurement of one C. D., if such were the fact,*] to conceal the death of said bastard child, the said issue of her body, so that it might not come to light, whether it were born alive or not, or whether it were murdered or not; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

Bawdy-House.—See "Nuisance."

Bestiality.—See "Sodomy."

Bigamy.—See "Polygamy."

Murder of Bastard Children.—See "Murder," *post.*

BLASPHEMY.

76. *For Blasphemy, by blaspheming the holy Name of God.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of yeoman, on the day of now last past, at B. aforesaid, in the county aforesaid, being a person of an immoral and irreligious mind and disposition, and intending the holy name of God to dishonor and blaspheme, did then and there wilfully commit the heinous crime of blasphemy, and did wilfully blaspheme the holy name of God, by denying, cursing, and contumeliously reproaching God, his creation, government, and final judging of the world; that is to say, the said A. B., then and there, in the presence and hearing of divers good and worthy citizens of the said Commonwealth, did wilfully and blasphemously speak, pronounce, utter, and publish, these profane and blasphemous words following,[2] to

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[1] This and the three following precedents are original by the author, and are drawn upon the statute of Massachusetts of 1782, c. 8, and are in the form of the indictments used in the Supreme Court of Massachusetts. See precedents for blasphemy at common law, and the note to the same, *Post.*

[2] The blasphemous words must be set forth, that the Court may judge whether they are blasphemous or not. 1 Stark. 114; Str. 686.

wit, [*here insert the words spoken and published, verbatim, and with proper inuendoes, if the words require it;*] in manifest contempt of religion, good government, good morals, and good manners; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

77. *For Blasphemy, by cursing and reproaching Jesus Christ.*

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county aforesaid, laborer, being a person of an immoral and irreligious mind and disposition, and intending the Christian religion to dishonor, defame, and vilify, on at in the county aforesaid, did wilfully commit the heinous crime of blasphemy, by wilfully cursing and reproaching Jesus Christ; that is to say, the said A. B. then and there, in the presence and hearing of divers good and worthy citizens of said Commonwealth, did wilfully and blasphemously speak, pronounce, utter, and publish these profane and blasphemous words following, to wit, [*here insert the words spoken, verbatim, with proper inuendoes, if the words require it;*] to the great dishonor of our Lord and Saviour Jesus Christ and of his holy religion, in manifest contempt of good government, good morals, and good manners; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

78. *For Blasphemy, by cursing and reproaching the Holy Ghost.*

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, being a person of an immoral and irreligious mind and disposition, and intending the Christian religion to revile and bring into contempt, on the day of at B. aforesaid, in the county aforesaid, did wilfully commit the heinous crime of blasphemy, by wilfully cursing and reproaching the Holy Ghost; that is to say, the said A. B. then and there, in the presence and hearing of divers good and worthy citizens of said Commonwealth, did wilfully, profanely, and blasphemously speak, utter, publish, and pronounce, these profane and blasphemous words following, to wit, [*here insert the words spoken, verbatim, with proper inuendoes, if the words require it;*] to the great dishonor of religion, good morals, and good manners; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

79. *For Blasphemy, by cursing and contumeliously reproaching the Holy Scriptures.*

The jurors &c., upon their oath present, that A. B., of in the county of yeoman, on the day of at B. aforesaid, in the county aforesaid, being a person of an immoral and irreligious mind and disposition, and intending the holy Word of God to bring into contempt, reproach, and ridicule, did commit the heinous crime of blasphemy, by wilfully cursing, and contumeliously reproaching the holy Word of God; that is to say, the canonical scriptures contained in the books of the Old and New Testaments, and by exposing them to contempt and ridicule, which books are as follows, to wit, [*here insert the names of the books from Genesis to Revelations;*] that is to say, the said A. B. then and there, in the presence and hearing of divers good and worthy citizens of said Commonwealth, did wilfully, profanely, and blasphemously, speak, pronounce, utter, and publish, these profane and blasphemous words following, to wit, [*here insert the words spoken, verbatim, with proper inuendoes, if the words require it;*] to the great dishonor and manifest injury of religion, good morals, and good manners; against the peace of said Commonwealth, and contrary to the form of the statute in case made and provided.

80. *For Blasphemy; at Common Law.*[1]

The jurors &c., upon their oath present, that A. B., of B., in

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[1] This precedent is taken from Chitt. C. L. 14, and is, in substance, the same as the precedent in Trem. P. C. 225, 226. There are no similar precedents in Starkie or the Cro. C. C. There are some variances in this precedent from that in Tremaine, from which it was probably copied. In Tremaine's precedent it is alleged, that defendant's intent was to blaspheme "God, and our Lord Jesus Christ, the Saviour of the world, and the *Holy Ghost.*" In Chitty's precedent, the "Holy Ghost" is left out. In the former, the words *true* Christian religion are used. In the latter, the word *true* is omitted.

Blasphemy against God and religion is indictable at common law. 1 East, P. C. 3; 2 Chit. C. L. 14, note (*a*); and Hawk. b. 1, c. 5, § 1, 2. In the case of *The People* v. *Ruggles*, 7 Johns. R. 290, the general form of the indictment corresponds with those in Chitty and Tremaine. The prefatory averments and conclusion are the same. But the precedent itself is not here inserted. The horrid and disgusting character and terms of the blasphemy in that case, are too revolting to be placed upon record oftener than necessity requires.

There is also another precedent in another ancient book, entitled "Officium Clerici Pacis," p. 192, 193, which is not here inserted for the reason last given.

the county of yeoman, devising and intending to scandalize and vilify the true Christian religion, as received and publicly professed within this (Commonwealth); and to blaspheme God and our Lord Jesus Christ, the Saviour of the world, on at in the county aforesaid, having and holding in his hands, a certain cup of wine, unlawfully, wickedly, and blasphemously, in the presence and hearing of divers good and worthy citizens of the said Commonwealth, spoke, pronounced, and with a loud voice published, these profane and blasphemous words following, that to say, "Here 's a health to Father, Son, and Holy Ghost," (meaning Almighty God, Jesus Christ the Saviour of the world, and the Holy Spirit;) and immediately thereupon, then and there drank the wine from the said cup; to the great dishonor of Almighty God, in contempt and disgrace of the Holy Trinity, to the great scandal of the profession of the Christian religion, and against the peace and dignity of the Commonwealth aforesaid.

BRIBERY.

81. *Against a Justice of the Court of Common Pleas, for accepting a Bribe.*[1]

The jurors &c., upon their oath present, that A. B., of in the county aforesaid, Esquire, on at in the county aforesaid, was one of the justices of the Court of Common Pleas, &c. [*here state the style of the Court,*] duly and legally appointed, qualified, and sworn to discharge and perform the duties of that office; the same being an office of importance and trust, concerning the administration of justice within this Commonwealth. And that the said A. B., being then and there such justice of said Court of Common Pleas as aforesaid, contriving and intending the duties of his said office, and the trust and confidence thereby reposed in him, to prostitute and betray, did then and there unlawfully and corruptly accept and receive of one C. D. the sum of dollars, as a bribe and pecuniary re-

[1] This offence is punishable at common law. See 4 Bl. Com. 139; 3 Inst. 147; *Rex* v. *Vaughan*, 4 Burr. 2500; 2 Chit. C. L. 681, and authorities there quoted.

ward, to influence and induce him the said A. B. to [*here state the facts relative to the subject-matters of the bribe*;] and that he the said A. B. did thereby unlawfully, wilfully, and corruptly, prostitute, violate, and betray, for the bribe and pecuniary reward aforesaid, so as aforesaid, by him the said A. B., in his said office, taken, accepted, and received, the duties of his office, and the trust and confidence in him therein and thereby reposed; to the great scandal, dishonor, and prostitution of the public justice of said Commonwealth, and against the peace and dignity of the same Commonwealth.

82. *For attempting to bribe a Justice of the Court of Common Pleas.*[1]

The jurors &c., upon their oath present, that A. B., of in the county of Esquire, on the day of at B. aforesaid, in the county aforesaid, was one of the justices of the Court of Common Pleas, [*here state the style of the Court*,] duly and legally appointed, qualified, and sworn to discharge and perform the duties of said office; the same being an office of trust and importance in the administration of public justice within the said Commonwealth; and that C. D., of in the county aforesaid, yeoman, on the same day of in the year aforesaid, at B., in the county aforesaid, well knowing the premises, but unlawfully and corruptly devising and intending the said A. B. to seduce and corrupt, and to tempt him to violate, prostitute, and betray the duties of his said office, and the trust and confidence thereby reposed in him, did then and there unlawfully and corruptly propose and offer to pay to the said A. B., being then and there such justice as aforesaid, the sum of dollars, as a bribe and pecuniary reward, to induce and influence him the said A. B. to violate, betray, and prostitute the duties of his said office, by [*here insert the facts concerning which the bribe was offered*;] to the great injury and dishonor of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid.

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[1] Attempt to bribe, though it does not succeed, is indictable. 2 East, 5; 1 East's Rep. 183; *Rex* v. *Vaughan*, 4 Burr. 2494.

83. *For bribing a Person to procure an Office of Trust: On the Provincial Statute of Massachusetts of* 1758.[1]

The jurors &c., upon their oath present, that A. B., of in the county of yeoman, on the day of at B. aforesaid, in the county aforesaid, did unlawfully and corruptly give and engage to pay to one C. D. the sum of dollars as a consideration and pecuniary reward in order to induce him the said C. D., by his interest and influence, to procure and obtain for him the said C. D. the office of [*here state the name and description of the office*], which said office was then and there a place of trust within the said Commonwealth; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

84. *For accepting a Bribe to procure an Office of Trust: On the Provincial Statute of Massachusetts of* 1758.

The jurors &c., upon their oath present, that A. B. &c., on &c., at &c., did unlawfully and corruptly accept, take, and receive of one C. D. the sum of dollars, as a consideration and pecuniary reward for procuring for him the said A. B. the office of [*here insert the name and description of the office*], which office was then and there a place of trust within this Commonwealth; against the peace, and contrary to the form of the statute in such case made and provided.

85. *For offering to bribe a Commissioner of the Revenue of the United States.*[2]

The jurors &c., upon their oath present, that A. B., of in the district of yeoman, on at and within the jurisdiction of this court, wickedly, advisedly, and corruptly did solicit, urge, and endeavour to procure one C. D., he the said C. D. then and there being a commissioner of the revenue of the said United States, and then and there interested and employed in the execution of the duties of the said office, to receive proposals for contracting to build a light-house on Cape Hatteras, and a beacon on Shell Castle Island, for contracting with and giving a preference to him the said A. B., for the

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[1] Mass. Laws, vol. ii. Appendix, 1039, (Ed. of 1801.) This statute has never been revised, and is the only existing statute in Massachusetts upon the subject of bribery.

[2] 2 Dall. 386.

building of the said light-house and beacon; and in order to prevail upon him the said C. D. to agree to give him the said A. B. the preference in, and the benefit of such contract, he the said A. B. then and there did wickedly, advisedly, and corruptly offer to give the said C. D., then and there being commissioner of the revenue of the United States as aforesaid, the sum of dollars; in contempt of the laws and constitution of the said United States, and against the peace and dignity of the said United States.

86. *For endeavouring to bribe a Constable.*[1]

The jurors &c., upon their oath present, that heretofore, to wit, on at one A. B. Esquire, then and yet being one of the justices of the peace in and for the county of duly qualified, appointed, and sworn to discharge and perform the duties of said office, did then and there make and issue a certain warrant under his hand and seal, in due form of law, bearing date the day and year aforesaid, directed to any of the constables of the town of in the county aforesaid, thereby commanding them, upon sight thereof, to take and bring before him the said A. B., so being such justice as aforesaid, [*or some other justice of the peace for the said county, if such be the warrant,*] the body of one C. D., late of in the county aforesaid, to answer [*as in the warrant,*] and which said warrant afterwards, to wit, on the day of and year aforesaid, at aforesaid, in the county aforesaid, was delivered to E. F. of in the county aforesaid, yeoman, he the said E. F. then being one of the constables of the said town of aforesaid, duly appointed and qualified to discharge the duties of said office of constable, to be executed in due form of law. And the jurors aforesaid, upon their oath aforesaid, do further present, that G. H., late of in the county aforesaid, laborer, well knowing the premises, but contriving and unlawfully intending to pervert the due course of law and justice, and to prevent the said C. D. from being arrested and taken under and by virtue of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, at aforesaid in the county aforesaid, unlawfully, wickedly, and corruptly, did offer unto the said E. F., so being constable as aforesaid, and having in his custody and possession the said warrant, so delivered to him to be executed as aforesaid, the sum of dollars, if he the said E. F. would refrain from executing the said warrant, and from taking and arresting the said C. D. under

[1] Archb. Cr. Pl. 322.

and by virtue of the same warrant, for and during fourteen days from that time, that is to say, from the time he the said G. H. so offered the said sum of to the said E. F. as aforesaid; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said G. H., in manner and form aforesaid, did attempt and endeavour to bribe the said E. F., so being constable as aforesaid, to neglect and omit to do his duty as such constable, and to refrain from taking and arresting the said C. D. under and by virtue of the warrant aforesaid; against the peace and dignity of said Commonwealth.

87. *For Bribery of a Judge of the United States: On the act of April* 30, 1790, § 21.[1]

The jurors &c., upon their oath present, that A. B., of in the district of on at within the district aforesaid, did give to one C. D. of &c., he the said C. D. being then and there a judge of [*here insert the style of the Court*] duly and legally appointed and qualified to discharge the duties of that office, the sum of dollars, as a bribe, present, and reward, to obtain and procure the opinion, judgment, and decree of him the said C. D., in a certain suit [*controversy or cause*] then and there depending before him the said C. D., as judge as aforesaid, of the said court: to wit [*here state the nature of the suit;*] the said office of judge of the said court being then and there an office and trust concerning the administration of justice within the said United States; against the peace of said United States, and contrary to the form of the statute thereof in such case made and provided.

88. *For giving a Bribe to the President or Directors of the Bank of the United States: On the act of March* 3, 1819, § 4.[2]

The jurors &c., upon their oath present, that A. B. of &c., in the district aforesaid, gentleman, on at did give the sum of dollars to one C. D. of &c. [*or if any other bribe mentioned in the statute, state it,*] he the said C. D. being then and there the president of the bank of the United States, [*or one of the directors of the bank of the United States or president or director of one of the branch banks of the United States, established at as the case may be,*] as a bribe, present, and reward, to obtain and procure the opinion, vote, and interest of the

[1] Gord. Digest, p. 713, art. 3635.

[2] Gord. Digest, art. 3642.

said C. D., the said president of the said bank of the United States, [*or director thereof, as the fact may be,*] in a certain election [*here state the matter or thing which was the question before the president and directors &c.*] which came before the said president and directors for decision, in relation to the interest and management of the business of the said bank; against the peace of said United States, and against the form of the statute thereof in such case made and provided.[1]

89. *Against an Officer of the Customs for receiving a Bribe for a false Entry of a Vessel, Goods, &c.: On the Act of the United States of March* 2, 1719, § 88.[2]

The jurors &c., upon their oath present, that A. B., of &c., on &c., at &c., he the said A. B. being then and there an officer of the customs, to wit, [*here state the name of the officer, and the place where he discharged his duty, and where the custom-house was established,*] did directly and corruptly take and receive of one C. D., of &c., the sum of   dollars, as a bribe, reward, and recompense for permitting him the said C. D. to make a false entry of a certain vessel, called the [*here state the name of the vessel,*] and of the goods and cargo on board the same, to wit, [*here state the facts relative to the false entry, how it was done, and the fraud relative to the false entry of the cargo or goods;*] against the peace of the said United States, and against the form of the statute thereof in such case made and provided.

Burying Places. — See "Sepulchres of the Dead."

Burning. — See "Arson."

Bridges. — See "Nuisance."

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[1] The statute inflicts the same penalties upon the officer of the bank who *accepts* the bribe.

[2] Gord. Digest, art. 2014.

BURGLARY:

AND OTHER BREAKING AND ENTERING OF BUILDINGS.

90. *Indictment for Burglary at Common Law.*[1]

The jurors &c., upon their oath present, that A. B., late of in the county of laborer, on about the hour of one in the night of the same day, with force and arms, at in the county aforesaid, the dwelling-house of one C. D. there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said C. D., in the said dwelling-house then and there being, then and there feloniously and burglariously to steal, take, and carry away; and one gold watch of the value of fifty dollars [*describe the property and value of each article according to the fact*] of the goods and chattels of the said C. D. in the dwelling-house aforesaid then and there being found, then and there feloniously and burglariously, did steal, take and carry away; against the peace and dignity of the Commonwealth aforesaid.

91. *For a Burglary with intent to steal.*[2]

The jurors &c., upon their oath present, that A. B., of in the county of laborer, on about the hour of one in the night of the same day, with force and arms, at aforesaid, in the county aforesaid, the dwelling-house of one C. D. there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said C. D., in the dwelling-house aforesaid then and there being found, then and there feloniously and burglariously to steal, take, and carry away; against the peace of said Commonwealth, [*if there be a statute punishing the offence,*] and contrary to the form of the statute in such case made and provided.

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[1] Stark. Cr. Pl. 414; 3 Chitt. C. L. 1100. See the notes both in Starkie and Chitty, as to the different allegations in the indictment. They are nearly the same in both. See also a precedent in Cro. C. C. 203, (6th Ed.) in which the words "with intent the goods and chattels of the said C. D. &c., in the said dwelling-house then and there being, feloniously and burglariously to steal &c." are omitted.

[2] 3 Chitt. C. L. 1101; 2 Leach, 712; Vandercourt and Abbot's case.

92. *For a Burglary, Defendant being armed with a dangerous Weapon.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of about the hour of eleven in the night of the same day, with force and arms, at aforesaid, in the county aforesaid, the dwelling-house of one C. D. there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said C. D. in the dwelling-house aforesaid then and there being found, feloniously and burglariously to steal, take, and carry away; he the said C. D. and divers others of his family being then and there lawfully in the said dwelling-house; and he the said A. B. being then and there, at the time of breaking and entering said dwelling-house as aforesaid, armed with a certain dangerous weapon called a pistol, which was then and there loaded with gunpowder and leaden bullets; and one silver tankard of the value of fifty dollars, of the goods and chattels of the said C. D. in the dwelling-house aforesaid then and there being found, then and there feloniously and burglariously did steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

93. *For a Burglary by breaking out of a Dwelling-house.*[2]

The jurors &c., upon their oath present, that A. B., of in the county of laborer, on the day of about the hour of two in the night of the same day, at B. aforesaid, in the county aforesaid, having entered, and then and there being in the dwelling-house of one C. D. there situate, with intent the goods and chattels of him the said C. D. in the dwelling-house aforesaid then and there being, feloniously and burglariously to steal, take, and carry away; one pocket-book of the value of one dollar, and sundry bank notes, amounting together to the sum of fifty dollars, and of the value of fifty dollars, of the goods and chattels of him the said C. D., in the said dwelling-house of him the said C. D. then and there being found, then and there, with force and arms, feloniously did steal, take, and carry away; and that he the said A. B. being so as aforesaid entered, and in the said dwelling-house, with the said felonious intent, and having com-

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[1] On the first section of the statute of Massachusetts, 1805, ch. 101.

[2] Ibid.

mitted the felony and larceny aforesaid, and being then and there armed with a certain dangerous weapon called a cutlass, on the same day of aforesaid, in the year aforesaid, about the hour of two in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, the same dwelling-house then and there feloniously and burglariously did break to get out of the same, and then and there did break and get out of the same, he the said C. D. and divers others of his family being then and there lawfully in his dwelling-house; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

94. *For Burglary, where the Prisoner armed himself with a dangerous Weapon in the Dwelling-house.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on the day of now last past, about the hour of two in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of one C. D. there situate, feloniously and burglariously did break and enter, with intent the goods, chattels, and money of the said C. D., in the dwelling-house aforesaid then and there being, feloniously and burglariously to steal, take, and carry away; he the said C. D., and divers others of his family, being then and there lawfully in said dwelling-house; and that he the said A. B. having then and there, in the dwelling-house aforesaid, armed himself with a certain dangerous weapon called a fire-shovel, ten linen shirts of the value of twenty dollars, and sundry pieces of silver coin called Spanish milled dollars, amounting together to the sum of ten dollars, and of the value of ten dollars, of the monies, goods, and chattels of him the said C. D., then and there in the dwelling-house aforesaid being found, then and there feloniously and burglariously did steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

95. *For Burglary, where the Prisoner committed an Assault upon a Person lawfully in the House.*[2]

The jurors &c., upon their oath present, that A. B., of B., in the county aforesaid, laborer, on the day of now last past, about the hour of eleven in the night of the same day,

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[1] On the first section of the statute of Massachusetts, 1805, ch. 101.

[2] Ibid.

with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of one C. D. there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said C. D., in the dwelling-house aforesaid then and there being, feloniously and burglariously to steal, take, and carry away; he the said C. D., and divers others of his family, being then and there lawfully in the said dwelling-house, and that he the said A. B. then and there, in and upon one E. F., who was then and there lawfully in the said dwelling-house, feloniously and burglariously an actual assault did make, and him the said E. F. did then and there beat, wound, and abuse, and ten pieces of gold coin, called eagles, of the value of one hundred dollars, of the monies[1] of him the said C. D., then and there in the dwelling-house aforesaid being found, feloniously and burglariously did steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

96. *Burglary against the Principal, and others present, aiding, assisting, &c.*[2]

The jurors &c., upon their oath present, that [*draw the indictment against the principal, conformable to the foregoing precedents, as the case may be, and then proceed as follows.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., of   in the county of   laborer, at the time said felony and burglary was committed, in manner and form aforesaid, to wit, on the said   day of   in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, was feloniously and burglariously present, aiding, assisting, and consenting to the felony and burglary aforesaid, and aiding and assisting the said A. B. the felony and burglary aforesaid, in manner and form aforesaid, to do and commit; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[3]

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[1] This word ought to be used, when the property stolen is cash or money. 3 Chitt. C. L. 947.

[2] On the first section of the Statute of Massachusetts, 1805, c. 101.

[3] See "Accessory," for precedents against accessories in burglary before and after the fact.

97. *For entering a Dwelling-house, in the Night Time, without breaking, with Intent &c.*[1]

The jurors &c., upon their oath present, that A. B., of in the county aforesaid, laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, the dwelling-house of one C. D. there situate, in the night time, to wit, about the hour of two in the night of the same day, did enter without breaking, with intent the goods and chattels of him the said C. D., in the dwelling-house aforesaid then and there being, feloniously to steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

98. *For breaking and entering a Ship or Vessel, in the Day Time, with Intent &c.*[2]

The jurors &c., upon their oath present, that A. B., of in the county aforesaid, laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, a certain ship,[3] belonging to, and the property of one C. D.,[4] called the then and there lying and being within the body of the said county of in the day time, did break and enter, with intent the goods, chattels, and monies of the said C. D., in the ship aforesaid then and there being, feloniously to steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[5]

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[1] On the fourth section of the Statute of Massachusetts, 1805, c. 101.

[2] On the same section of the statute.

[3] The kind of vessel, whether *ship*, *sloop*, &c., should be truly inserted.

[4] If any one, but not all the owners are known, the name of the one known may be stated; the names of the others may be alleged to be unknown to the grand jury.

[5] The two preceding precedents may be adopted in all the other cases mentioned in the fourth section of the statute, by varying the allegation as to the description of the building, or vessel broken, according to the fact, and in the identical words of the statute.

CHALLENGING TO FIGHT.

99. *For sending a written Challenge.*[1]

The jurors &c., upon their oath present, that A. B., of B., in the county aforesaid, gentleman, being an evil disposed person, and intending to do great bodily harm and mischief to one C. D., and to provoke and excite him the said C. D. unlawfully to fight a duel with and against the said A. B., on at did unlawfully, wickedly, and maliciously, write, send, and deliver, and did cause to be written, sent, and delivered to the said C. D. a certain paper writing, in the form and manner of a letter from the said A. B. to the said C. D., containing therein as follows, [*or to the purport and effect following,*] that is to say, [*here set forth the letter, with proper innuendoes to explain it;*] meaning and intending, by the said paper writing, a challenge to the said C. D. to fight a duel with and against him the said A. B.; against the peace and dignity of the Commonwealth aforesaid.

100. *For sending a Challenge in a Letter.*[2]

The jurors &c., upon their oath present, that A. B., of in the county aforesaid, gentleman, being a person of a turbulent, wicked, and malicious disposition, and wickedly and maliciously designing and intending, not only to disquiet and terrify one C. D., but also the said C. D. maliciously and violently to kill and murder; and he the said A. B. his said malicious designs and intentions the sooner to complete and put in practice, on at in the county aforesaid, did unlawfully and wickedly provoke and excite the said C. D. to fight a duel against him the said A. B. with [*here name the instrument,*] and that he the said A. B., a certain challenge, in the name of the said A. B., in the form of a letter to the said C. D. directed, did then and there wickedly and maliciously write and cause to

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[1] This precedent is taken from 3 Chitt. C. L. 848, and is therein said to have been "settled in 1809 by an eminent crown lawyer now on the bench." Some of the prefatory averments, and the "great terror" of the parties challenged, in the conclusion, are omitted, as not necessary to the validity of the indictment. See note (w) to this precedent in Chitty, and the authorities there referred to explaining this offence.

[2] Taken from 3 Chitt. C. L. 852. A similar precedent is there referred to in Cro. C. C. (154, 6th Ed.); in which the purport of the letter is not set forth, nor any intimation that it ought to be. In the above and other precedents in Chitty the letter or writing is, or is supposed to be, set forth.

be written, which said letter was to the purport and effect following,[1] that is to say, [*here set forth the letter, with proper inuendoes to explain it*,] which said challenge, so as aforesaid written and directed, he the said A. B., afterwards, to wit, on the day of at aforesaid, in the county aforesaid, to the said C. D. wickedly and maliciously did send and deliver, and cause to be sent and delivered to the said C. D.; against the peace and dignity of the Commonwealth aforesaid.

101. *Another Precedent for challenging by Letter.*[1]

The jurors &c., upon their oath present, [*here set forth the introductory and prefatory matter, as in the next preceding precedents, and then proceed.*] And the said A. B, in pursuance of, and for the completing his said intent and design, did unlawfully, wickedly, and maliciously, by a letter and writing, provoke, excite, and challenge the said C. D. unlawfully to fight a duel with and against the said C. D.; against the peace and dignity of said Commonwealth.

102. *For a verbal Challenge.*[2]

The jurors &c., upon their oath present, that A. B., of in the county aforesaid, gentleman, being an evil disposed person, and intending to do great bodily harm and mischief to one C. D., and to provoke and incite him the said C. D. unlawfully to fight a duel with him the said A. B., on at in pursuance of, and for the completing of his said intent and design, did unlawfully, wickedly, and maliciously, by opprobrious words and threatening language, provoke, excite, and challenge the said C. D. unlawfully to fight a duel with and against him the said A. B.; against the peace and dignity of said Commonwealth.

103. *Another Precedent for a verbal Challenge.*[3]

The jurors &c., upon their oath present, that A. B., of B., in the county aforesaid, gentleman, being a person of a wicked and malicious mind and disposition, and wickedly, unlawfully, and

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[1] 3 Chitt. C. L. 850. In these precedents the letter is not copied nor intended to be set forth, either in the "tenor" or the "purport and effect." But it is advisable that the challenge, whether verbal or in writing, should be set out in the indictment. See 6 Wentw. 385.

[2] 3 Chitt. C. L. 850.

[3] 3 Chitt. 859, 860.

maliciously devising and intending to move, incite, instigate, and provoke one C. D. to fight a duel with him the said A. B., and thereby to kill and murder him the said C. D., on at did wickedly, unlawfully, openly, and maliciously challenge, and endeavour to move, incite, instigate, and provoke the said C. D. to fight a duel with him the said A. B., by then an there unlawfully, maliciously, and openly, and in the presence and hearing of him the said C. D., and without any just cause or provocation whatever, speaking and uttering these hostile, threatening, and challenging words following, that is to say, [*here set forth the words spoken*,] by means whereof the said C. D. was put in great fear and apprehension of his life; against the peace and dignity of the Commonwealth aforesaid.

104. *For carrying a Challenge to the Prosecutor.*[1]

The jurors &c., upon their oath present, that A. B., of in the county of yeoman, being a person of dissolute character and malicious disposition, and unlawfully and maliciously intending to procure great bodily harm and mischief to be done to C. D., of gentleman, and to incite and provoke the said C. D. unlawfully to fight a duel with and against one E. F., of the same place, Esquire, on at did unlawfully, wickedly, and maliciously deliver and cause to be delivered a certain written challenge, of and from the said C. D. to the said E. F., unlawfully to fight a duel with and against the said C. D., which written challenge is as follows; that is to say, [*here set out the written challenge;*] against the peace and dignity of the Commonwealth aforesaid.

105. *For provoking and inciting Prosecutor to fight.*

The jurors &c., upon their oath present, t at A. B., of in the county aforesaid, gentleman, being a person of dissolute character and malicious disposition, and unlawfully and maliciously intending to incite and provoke one C. D. to fight a duel with and against one E. F., on at did unlawfully, wickedly, and maliciously incite and provoke the said C. D. unlawfully to fight a due with the said E F.; against the peace and dignity of the Commonwealth aforesaid.

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[1] 3 Chitt. C. L. 854. See Hawk. b. 1, c. 63, § 3, for the authority for this and the following precedents. See also 3 Chitt. C. L. 854—858, &c. for a precedent for *writing* and *delivering* a challenge and other precedents, the substance of which is similar to those here inserted.

106. *For engaging in a Duel, where no Homicide ensued.*[1]

The jurors &c., upon their oath present, that A. B., of B., in the county of S., gentleman, being a person regardless of the life of man, and holding in contempt the authority and government of the supreme Giver and Disposer of human life, on with force and arms, at in the county aforesaid, did voluntarily engage in a duel with one C. D., with dangerous weapons, to wit, with pistols, then and there loaded with gunpowder and leaden bullets, to the great hazard of the lives of them the said A. B. and C. D.; in which duel, engaged in as aforesaid by the said A. B. and C. D., no homicide did ensue thereon; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

107. *For challenging, by written Message, to fight a Duel.*

The jurors &c., upon their oath present, that A. B., of B., in the county aforesaid, gentleman, being a person of a malicious and revengeful disposition, and intending and designing one C. D. wilfully and maliciously, and of his malice aforethought, to kill and murder, on the day of now last past, at B. aforesaid, in the county aforesaid, did unlawfully and maliciously, by written message, provoke, excite, and challenge him the said C. D. to fight a duel with him the said A. B., with dangerous weapons, to wit, with pistols; and that he the said A. B. a certain challenge, in the name of him the said A. B., and in the form of a written message to him the said C. D. directed, exciting and provoking him the said C. D. to fight a duel with the said A. B., did then and there wilfully and maliciously write and direct, and cause to be written and directed, which said challenge and written message is as follows,[2] to wit, [*here insert a copy of the message with proper inuendoes, if required;*] and that he the said A. B. the said written message did then and there wilfully and maliciously send and deliver, and cause and procure to be sent and delivered to the said C. D., no duel being or having been fought thereon; against the peace of said

[1] This and the four following precedents are original by the author, and are drawn upon the sixth and seventh sections of the Statute of Massachusetts of 1804, c. 123, § 6, and are such as have been used and sanctioned in and by the Supreme Judicial Court of that state.

[2] If the message or a copy of it cannot be procured, then say, "which said challenge and written message was then and there concealed and destroyed by the said A. B. or some other person, to the jurors aforesaid unknown, so that they cannot set forth the tenor or the substance thereof."

Commonwealth, and contrary to the form of the statute in such case made and provided.

108. *For being a Second in a Duel.*

The jurors &c., upon their oath present, that A. B., of B., in the county aforesaid, gentleman, on with force and arms, at B. aforesaid, in the county aforesaid, did voluntarily engage in a duel with one C. D., with dangerous weapons, to wit, with pistols, then and there loaded with gunpowder and leaden bullets, to the great hazard of the lives of the said A. B. and C. D., in which duel, engaged in as aforesaid, no homicide did ensue thereon; and the jurors aforesaid, upon their oath aforesaid, do further present, that E. F., of B., in the county aforesaid, gentleman, being a person regardless of the life of man, and holding in contempt the authority and government of the supreme Giver and Disposer of human life, on the said day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, did knowingly and voluntarily become, and then and there knowingly and voluntarily was, the second of the said C. D., and was then and there knowingly and voluntarily an agent and abetter of him the said C. D. in the duel and challenge aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

109. *For being a Second to a Person giving a Challenge, when no Duel is fought.*

[*Draw the indictment for sending the challenge according to the precedent, No.* 103, *and then go on.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that E. F., of B., in the county aforesaid, gentleman, on the said day of in the year aforesaid, at B., in the county aforesaid, did become, and then and there voluntarily and knowingly was a second, agent, and abetter of him the said A. B., in the giving, sending, and delivering of the challenge and message aforesaid, from him the said A. B. to the said C. D.; against the peace &c., and contrary to the form of the statute &c.

110. *For accepting a Challenge when no Duel ensued.*

The jurors &c., upon their oath present, that A. B., of in the county aforesaid, gentleman, on at in the county aforesaid, did accept a challenge to fight a duel with one C. D., and did then and there consent to fight therein with the

said C. D., with dangerous weapons, to wit, with pistols, loaded with gunpowder and leaden bullets, to the hazard of the lives of them the said A. B. and C. D., which challenge the said C. D. had, before that time, sent, given, and delivered, and caused and procured to be sent, given, and delivered to the said A. B. to fight said duel, by message for that purpose, upon which challenge no duel did ensue; against the peace &c., and contrary to the form of the statute, &c.

111. *For being a Second to a Person accepting a Challenge, when no Duel is fought.*

[*Draw the indictment for accepting the challenge, according to the next preceding precedent, No.* 110, *and then proceed.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that E. F., of B., in the county aforesaid, gentleman, on the said day of in the year aforesaid, at B. aforesaid, in the county aforesaid, did become and was a second, agent, and abetter of him the said C. D., in such acceptance of the challenge aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

CHAMPERTY.—See "Maintenance."

CHEATS.

112. *Indictment at Common Law for selling by false Scales.*[1]

The jurors &c., upon their oath present, that A. B., of in the county aforesaid, trader, on the day of and from thence until the day of the taking of this inquisition, at B., in the county aforesaid, did use and exercise the trade and business of a shopkeeper, and during that time did deal in the buying and selling by weight of divers goods, wares, and merchandises. And the said A. B., contriving and fraudulently intending the citizens of the said Commonwealth to cheat and defraud during the time he exercised the said trade and business, to wit, on at did knowingly, wilfully, and publicly keep, in

[1] Stark. 467, 468; 3 Chitt. 1000; Trem. P. C. 103, 106; Cro. C. C. 282 (7th ed.); Id. 283, selling brass chain for gold.

a certain shop there, wherein he carried on his said trade and business, a certain pair of false scales for the weighing of goods, wares, and merchandises, by him sold in the way of his trade ; which said scales were then and there, by artful and deceitful means, so made and constructed as to cause the goods, wares, and merchandises, weighed therein and sold thereby, to appear of greater weight than the real and true weight, by one eighth part of such apparent weight ; and that the said A. B., well knowing the said scales to be false, and so constructed and made, on at did knowingly and fraudulently sell to one C. D. certain goods in the way of his trade, to wit, a large quantity of flour, weighed in and by the said false scales, as and for one hundred pounds of flour, whereas, in truth and in fact, the weight of said flour, so weighed and sold as aforesaid, was short and deficient of the said weight of one hundred pounds by one eighth part of the weight of one hundred pounds ; against the peace and dignity of the Commonwealth aforesaid.

113. *For defrauding a Person by means of a counterfeit Letter and other false Tokens : On the Statute of 33 H. 8. c. 1.*[1]

The jurors &c., upon their oath present, that A. B., of in the county aforesaid, yeoman, devising how he might unlawfully and fraudulently obtain the monies of the honest citizens of said Commonwealth, on at did falsely and deceitfully pretend and affirm to one C. D., that his the said A. B.'s name was E. F., and that he was the son of one G. H., and that the said A. B. a certain false and counterfeit letter, in the name of him the said G. H., as a true and genuine letter of him the said G. H., falsely, deceitfully, and fraudulently, to him the said C. D. then and there did deliver, the said G. H. being then and long before the friend and intimate acquaintance of him the said C. D. ; by which said false and counterfeit letter it was stated and mentioned, [*here insert the letter, or the material part of it, with proper inuendoes, if the letter requires it ;*] and that the said C. D., then and there believing the said false and counterfeit letter to be the proper hand-writing of him the said G. H., did then and there [*here insert what was obtained and done by means of the counterfeit letter ;*] whereas, in truth and in fact, the said G. H. never did write or send, or cause to be written or sent, any such letter to him the said C. D., desiring him [*here*

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[1] See similar precedents in Stark. 469 ; Cro. C. C. 278 (6th ed.) ; 3 Chitt. 1004. The prefatory averments in these precedents, " evil disposed person, &c." are omitted as superfluous.

repeat the substance of the letter;] by means whereof, and of all which, the said A. B., by means of the said counterfeit letter, and by the said false tokens and pretences, unlawfully, falsely, fraudulently, and deceitfully, did obtain and get into his hands and possession, of and from the said C. D., the said [*here describe the property obtained,*] in manner and form aforesaid; and the said C. D. of the said [*the property obtained,*] in manner and form aforesaid, then and there fraudulently and deceitfully did deceive, cheat, and defraud; against the peace and dignity of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided.[1]

114. *For obtaining Goods of a Shopkeeper, under Pretence of being Servant to a Customer.*[2]

The jurors &c., upon their oath present, that A. B., of B., in the county aforesaid, laborer, contriving and intending one C. D., of B. aforesaid, shopkeeper, unlawfully, fraudulently, and deceitfully, by false pretences, to cheat and defraud of his goods, wares, and merchandises, on at aforesaid, unlawfully, knowingly, and designedly, did falsely pretend to the said C. D., that he the said A. B. then was the servant of one E. F., of tailor, (the said E. F. then, and long before, being well known to him the said C. D., and a customer of him the said C. D., in his said business and way of trade;) and that he the said A. B. was sent by the said E. F. to the said C. D. for five yards of superfine woollen cloth; by which said false pretences the said A. B. did then and there unlawfully, knowingly, and designedly obtain from the said C. D. five yards of superfine woollen cloth, of the value of fifty dollars, of the goods, wares, and merchandises of him the said C. D., with intent him the said C. D. then and there to cheat and defraud of the same; whereas, in truth and in fact, the said A. B. was not then the servant of the said E. F., and was not then, or ever had been, sent by the said E. F. to the said C. D. for the said cloth, or for any cloth whatever; to the great damage and deception of the said

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[1] See the case of *Commonwealth* vs. *Warren*, 6 Mass. R. 72, where it is decided that the statute of 33 H. 8, c. 1, has been adopted in Massachusetts "as a part of the common law." There seems to be no doubt, that a forged letter, similar to that set forth in this precedent, might be considered and treated as a forged order "for the payment of money or the delivery of goods," and proceeded upon as a forgery.

[2] See similar precedents in 3 Chitt. 1005; Stark. 474; Cro. C. C. 305, (6th ed.)

C. D., against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

115. *For obtaining Goods under pretence of being Merchants of Property and Credit.*[2]

The jurors &c., upon their oath present, that A. B. and C. D., both of in the county aforesaid, laborers, contriving and intending unlawfully, fraudulently, designedly, deceitfully, and by false pretences, to cheat and defraud one E. F. of his goods and merchandises, on at in the county aforesaid, did falsely, knowingly, and designedly pretend to the said E. F. that the said C. D. then was a merchant of great property, who wanted to purchase horses in order to export and send them abroad, and that he then was a housekeeper at P., in the county of whereas in truth and in fact, the said C. D. was not then a merchant of great property who wanted to purchase horses in order to send them abroad; nor was he then a housekeeper at P aforesaid, as the said A. B. and C. D. then and there falsely pretended to the said E. F.; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. and C. D., by the false pretences aforesaid, did then and there unlawfully, knowingly, and designedly obtain from the said E. F. one mare of the value of fifty dollars, and six geldings of the value of three hundred dollars, with intent then and there to cheat and defraud the said E. F. of the same; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

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[1] This precedent concludes *contra formam statuti.* The statute of 30 Geo. 2, c. 24, has never been adopted in Massachusetts; but the statute of that state of 1815, c. 136, "For the Suppression and Punishment of Cheats," is substantially in the same language as the above mentioned statute of 30 Geo. 2.

[2] 3 Chitt. 1006, in which precedent there is a second count, omitting the words that defendant "wanted horses to send them abroad," and a third count omitting the false pretence of residence. The facts set forth in this precedent would amount to a fraudulent conspiracy at common law.

See similar precedents in Cro. C. C. 303, (6th Ed.); Stark. 473, in which the false pretences are negatived in the conclusion of the indictment, as is most usual.

116. *For obtaining Money by drawing upon a Person whom the Defendant pretended was indebted to him and was a Person of Property.*[1]

The jurors &c., upon their oath present, that A. B., of yeoman, contriving and intending unlawfully, fraudulently, knowingly, and designedly, and by false pretences, to cheat and defraud one C. D. of his money, on at in the county aforesaid, unlawfully, fraudulently, knowingly, and designedly, did falsely pretend to the said C. D., that one E. F. was a person of property and credit, residing at in the county of and that divers large sums of money were due and owing to him the said A. B. from the said E. F., and that the said E. F. would accept and pay a certain bill of exchange according to the tenor thereof, then and there drawn by the said A. B. upon the said E. F., and dated the day and year last aforesaid, and whereby the said A. B. required the said E. F. to pay to him the said C. D. or order, the sum of one hundred dollars, in six days after date thereof, and to place the same to account of him the said A. B., and then and there delivered the same to the said C. D.; which said bill of exchange is of the purport and effect following, to wit, [*here set forth the bill;*] by which said false pretence, the said A. B. did afterwards, to wit, on the same day and year aforesaid, at B. aforesaid, in the county aforesaid, unlawfully, knowingly, and designedly, obtain from the said C. D. the said sum of one hundred dollars, of the monies of him the said C. D., with intent then and there to cheat and defraud him of the same; whereas in truth and in fact the said E. F. was not then a person of property residing at said and whereas in truth and in fact there were not then divers large sums of money due from said E. F. to said A. B., and the said E. F. would not and could not pay the said bill of exchange, or any part of the money therein mentioned, but was then wholly insolvent and unable to pay the same, all which the said A. B. then and there well knew; against the dignity of the Commonwealth, and contrary the form of the statute in such case made and provided.

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[1] Stark. 471; the words "to support his profligate way of life," are omitted as unnecessary. Id. note (*l.*)

117. *For obtaining a Note under pretence of inspecting it, and then cancelling and destroying it.*[1]

The jurors &c., upon their oath present, that A. B., of in the county of laborer, contriving and intending fraudulently, knowingly, and designedly, and by false pretences, one C. D. to cheat and defraud of a certain promissory note of hand for the payment of money, and of the money lawfully due thereon, and to obtain and get into his hands and possession from the said C. D. the said promissory note, with the intent and purpose knowingly and designedly to cancel, obliterate, and destroy the same, on at did falsely, knowingly, and designedly pretend to the said C. D., that if he the said C. D. would permit him the said A. B. to examine and inspect a certain promissory note for the payment of money, signed with the proper hand-writing of him the said A. B., bearing date the day of then before, by which note the said A. B. promised to pay the said C. D., or his order, the sum of dollars, in one month after the date of the same, for value received of him, [*describe the note truly, according to the fact, or insert a copy of it in the indictment, if a copy had been retained,*] that he the said A. B. would then and there examine and inspect said note, and then and there immediately redeliver the same note to the said C. D.; and that he the said A. B. afterwards, to wit, on the said day of in the year aforesaid, at B. aforesaid, by means of the false pretences aforesaid, did acquire and obtain the said note from the said C. D., and did then and there in the county aforesaid, fraudulently, knowingly, and designedly cancel, tear, obliterate, and destroy the same, (the said sum of dollars, in the said note expressed, being then and there due and unpaid, and the said C. D. being then and there the owner and proprietor thereof,) with intent, him the said C. D. then and there knowingly, designedly, and fraudulently, to cheat and defraud of the monies due on the same; whereas, in truth and in fact, the said A. B. did not intend to redeliver

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[1] Cro. C. C. 288 (6th Ed.) I find no precedent similar to this either in Tremaine, Chitty, or Starkie. I have changed the manner of alleging the facts, as they are stated in the precedent in Cro. C. C. It is there drawn at common law. The object being to bring the offence within the statutes for the suppression of cheats; but this indictment would be also good at common law. There probably is no doubt, that if it were the intention of the defendant to destroy the note *at the time* he obtained it, by the false pretences, it would amount to larceny.

the said note to the said C. D. after he had examined and inspected the same; but then and there obtained the possession of the same note in manner and form aforesaid, with intent fraudulently, knowingly, and designedly to cancel, tear, obliterate, and destroy the same; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

Coin. — See "Forgery and Counterfeiting."

COMPOUNDING A FELONY.

118. *For compounding a Felony.*[2]

The jurors &c., upon their oath present, that A. B., of B., in the county aforesaid, yeoman, on the day of now last past, at aforesaid, in the county aforesaid, came before C. D., Esquire, then and yet being one of the justices of the peace in and for the said county of duly and legally authorized and qualified to execute and perform the duties of that office; and then and there, upon his oath, did charge, accuse, and complain against one E. F. for feloniously stealing [*here set forth the complaint to the justice;*] upon which accusation and complaint, the said C. D., Esquire, issued his warrant under his hand and seal, in due form of law, for the apprehending and taking the said E. F. to answer to, and be examined and dealt with touching and concerning the felony aforesaid, so as aforesaid charged upon him the said E. F., as to law and justice might appertain. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the day of in the year aforesaid, at B. aforesaid, in the county aforesaid, the said E. F. was duly arrested and taken by virtue

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[1] There are a great variety of other precedents in the English books of precedents of indictments, for cheats, frauds, &c. Those in Trem. P. C. were all drawn before the statute of 30 Geo. 2, c. 24, was enacted, and do not conform to the terms of that statute.

[2] See other precedents, 2 Chitt. 220; Cro. C. C. 223 (6th Ed.); 4 Wentw. 327; Stark. 679. The form in the last edition of Cro. C. C. is more concise than that in prior editions, and the other precedents above referred to, 2 Chitt. 220, note (*k*.)

of the said warrant, for the felony aforesaid; and was then and there carried before the said C. D., Esquire, the justice aforesaid, and was then and there examined by him the said justice of and concerning the felony aforesaid; and the subject-matter of said complaint was examined into and heard by the said justice. Upon which said examination and hearing, the said C. D., Esquire, did then and there make a certain warrant, under his hand and seal, in due form of law, directed to the keeper of the Commonwealth's gaol in said B., or his under keeper or deputy; thereby commanding the aforesaid keeper or his deputy to receive into his custody the body of the said E. F., so charged with such felony as aforesaid, and him in custody safely to keep, until he should be discharged by due course of law. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., well knowing the premises, but contriving and intending unlawfully and unjustly to pervert the due course of law in this behalf, and to cause and procure the said E. F. for the felony aforesaid to escape with impunity, afterwards, to wit, on at &c., unlawfully and for the sake of private gain, did take upon himself to compound the said felony on behalf of the said E. F., and then and there did exact, receive, and have of the said E. F. the sum of dollars, for and as a reward for compounding the said felony, and for desisting from all further prosecution against the said E. F. for the same; against the peace and dignity of the Commonwealth aforesaid.

119. *For compounding an Offence against a penal Statute.*[1]

The jurors &c., upon their oath present, that A. B., of in the county aforesaid, yeoman, heretofore, to wit, on the day of prosecuted out of the court of Common Pleas, &c., (*here state the style of the court, and for what county it was to be holden,*] a certain writ against one C. D., directed to the sheriff of [*here recite the writ.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that the said writ, so sued out as aforesaid by the said A. B., was by him sued out with intent to declare against the said C. D. in the same court, in a plea of debt for a certain penalty supposed to have been incurred by the said C. D., by reason of his the said C. D's having before that time, [*here insert the facts upon which the penalty is supposed to have accrued, which may be taken from the declaration in the writ before recited;*] against the form of the statute in such case made and provided. And the jurors afore-

[1] See similar precedents in 2 Chitt. 227; 4 Wentw. 399.

said, upon their oath aforesaid, do further present, that the said A. B., not regarding the statute in that case made and provided, on at aforesaid, in the county aforesaid, unlawfully, and for the sake of private gain, did take upon himself to compound and agree with the said C. D. for the said offence, without the order or consent of said court, out of which the said writ was issued as aforesaid; and then and there unlawfully did exact, receive, and have of and from the said C. D. the sum of dollars, as and for a reward for compounding with the said C. D., for the said offence, and desisting from further prosecuting his said suit; against the peace and dignity of the Commonwealth aforesaid.[1]

CONSPIRACY.

120. *For a Conspiracy to charge a Man with a Rape, with Intent to obtain Money from him.*[2]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of yeoman, and C. D., the wife of the said A. B., and E. F., of said yeoman, devising and intending, unjustly and maliciously, to deprive one G. H. of his good name and character, and to subject him the said G. H., without any just cause, to the punishment by law inflicted for the crime of rape, on at in the county aforesaid, falsely, unlawfully, wickedly, and maliciously, did combine, conspire, confederate, and agree together, falsely to charge and accuse, and then and there in pursuance of said conspiracy, combination, and agreement, did falsely charge and

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[1] This offence is created by statute 18 Eliz.; but it is presumed to be also an offence at common law.

[2] There are precedents for this offence in 3 Chitt. 1183; Stark. 690; and Cro. C. C. 240, (6th Ed.), which are merely copies of each other. Those parts of them which consist of averments of overt acts, matters of inducement, &c., seem to render them unnecessarily prolix; and are, therefore, not retained in the following precedents. The authorities for rejecting this superfluous matter were collected, stated, and relied upon in the case of *The Commonwealth* v. *Judd et al.*, 2 Mass. R. 329, and are as follows; 9 Rep. 56, 3d part; 8 Mod. 321; 11 Mod. 55; 3 Burr. 1330; 1 Lev. 125; 1 Keb. 203; 1 Vent. 304; 1 Str. 193; 1 Salk. 174; 8 Mod. 11; 1 Leach C. C. 47.

accuse him the said G. H., that he had then lately before feloniously ravished and carnally known the said C. D. by force and against her will; with intent unjustly to obtain and acquire of and from him the said G. H., to them the said A. B., C. D., and E. F. divers sums of money for compounding the said pretended felony and rape, so as aforesaid falsely, wickedly, and maliciously charged upon him; against the peace and dignity of the Commonwealth aforesaid.

121. *For a Conspiracy to charge a Man with receiving stolen Goods, knowing them to be stolen, and obtaining Money for compounding the same.*[1]

The jurors &c., upon their oath present, that A. B. and C. D., both of in the county of laborers, wickedly and maliciously devising and intending one E. F. unjustly to deprive of his good name and character, and also fraudulently to obtain and acquire to themselves, of and from the said E. F., divers sums of money, on the day of at in the county aforesaid, did wickedly, fraudulently, and maliciously conspire, combine, confederate, and agree among themselves, falsely to charge and accuse, and in pursuance of said conspiracy, combination, confederacy, and agreement, did then and there falsely charge and accuse the said E. F., that he had then lately before received certain stolen goods, which had then lately before been feloniously stolen, taken, and carried away, knowing them to be stolen; and that they the said A. B. and C. D., by divers threats and menaces of them the said A. B. and C. D. made and uttered in pursuance of the said conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had between them the said A. B. and C. D., that the said E. F. should be prosecuted and punished as a receiver of stolen goods, knowing them to be stolen, afterwards, to wit, on the said day of in the year aforesaid, at B. aforesaid, in the county aforesaid, did demand, receive, and take the sum of fifty dollars of him the said E. F., for and as a composition of, and agreement not to prosecute the said pretended offence, and to discharge him the said E. F. from all further prosecution for the same; against the peace and dignity of the Commonwealth aforesaid.

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[1] See similar precedents in 3 Chitt. 1181; Stark. 692; Cro. C. C. 243, (6th Ed.) These precedents are also transcripts of each other; the superfluous matter in which, is not retained in this precedent for the reasons and upon the authorities stated and referred to in note (2) to the preceding precedent.

122. *For a Conspiracy among Workmen to raise their Wages and lessen the Time of Labor.*[1]

The jurors &c., upon their oath present, that A. B., C. D., and E. F , all of in the county of laborers, on the day of now last past, at B. aforesaid, in the county aforesaid, being all workmen and journeymen in the art and manual occupation of a wheelwright, not being content to work and labor in that art and occupation by the usual number of hours in each day, and at the usual rates and prices, for which they and other journeymen and workmen, in the said art and occupation, were accustomed to work and labor, but falsely and fraudulently conspiring and combining unjustly and oppressively to increase and augment the wages of themselves and other journeymen and workmen in the said art, and unjustly to exact and extort great sums of money for their labor and hire in their said art, mystery, and manual occupation, from their employers who employ them therein, on the same day and year aforesaid, at B. aforesaid, in the county aforesaid, together with divers other workmen and journeymen in the same art and manual occupation, (whose names are to the jurors aforesaid unknown,) unlawfully did assemble and meet together, and so being assembled and met, did then and there unlawfully and corruptly conspire, combine, confederate, and agree together and among themselves, that none of the said conspirators, after the same day of would work at any lower or less rate than one dollar for the hewing of every hundred spokes for wheels, and two dollars for making every pair of hinder wheels, for or on account of any person or employer whatsoever in the said art and occupation ; and also that none of the said conspirators would work day work or labor any longer, than from the hour of six in the morning till the hour of seven in the evening in each day from thenceforth ; against the peace and dignity of the Commonwealth aforesaid.

123. *For a Conspiracy to charge a Man with being the Father of a Bastard Child.*[2]

The jurors &c., upon their oath present, that A. B., C. D., and E. F., all of in the county of laborers, on the

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[1] See similar precedents in Stark. 694; 3 Chitt. 1163; Cro. C. C. 249, (6th Ed.) These are precedents at common law; but it is said they would be good upon the statute of 2 & 3 Edw. 6, if concluded *contra formam statuti.*

[2] See a long precedent for a conspiracy of this description in Stark. 698, and the authorities referred to in note (*a.*)

day of at B. aforesaid, in the county aforesaid, did unlawfully conspire, combine, confederate, and agree among themselves, falsely and maliciously, and without any just cause, and for the sake of unlawful and unjust gain, to charge one G. H. with the crime of adultery; and also to obtain and extort from the said G. H. divers large sums of money by unlawful ways and means; and that they the said A. B., C. D., and E. F., in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had among themselves, afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, in the county aforesaid, unlawfully, falsely, and maliciously, and for the sake of unlawful and unjust gain, did charge and accuse the said G. H., that he the said G. H. then lately before, had carnal knowledge of the body of one I. J., and was the reputed father of a certain illegitimate child, born of the body of her the said I. J., he the said G. H. being then and there a married man, and having a lawful wife alive; against the peace and dignity of the Commonwealth aforesaid.

124. *For a Conspiracy to cheat a Man of his Goods, under Pretence of buying them.*[1]

The jurors &c., upon their oath present, that A. B., C. D., and E. F., all of B., in the county of laborers, on at did falsely conspire, confederate, and agree among themselves, unlawfully and fraudulently to acquire and get into their hands and possession the goods, wares, and merchandises of one G. H., under color and pretence of buying the same of and from the said G. H., and that, in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, they the said A. B., C. D., and E. F., then and there falsely, unlawfully, and deceitfully did obtain and acquire of the said G. H. twenty yards of broadcloth, of the value of one hundred dollars, under pretence of buying the same, and did then and there, in pursuance of the conspiracy &c. aforesaid, cheat and defraud him thereof; against the peace &c.

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[1] See the substance of this precedent in Trem. P. C. 91, *The King* vs. *Wilcox*, in which case it was prosecuted as a cheat.

125. *For a Conspiracy to make an unlawful and oppressive Tax.*[1]

The jurors &c., upon their oath present, that A. B., C. D., and E. F., all of in the county of B., yeomen, they the said A. B., C. D., and E. F. having lately before been legally chosen assessors of the said town of B., for the year aforesaid, and having each of them accepted the said office, and having each of them severally qualified themselves according to law, to discharge and perform the duties of said office, on at did unlawfully, falsely, and corruptly conspire, combine, confederate, and agree among themselves, by virtue and color of their said offices, to make an unlawful, unequal, and oppressive tax and assessment upon the inhabitants of the said town of B., and upon their polls and estates; and that they the said A. B., C. D., and E. F., in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had by and between them, did then and there falsely, unlawfully, and corruptly, by virtue and color of their said offices, proceed to make and publish a certain unlawful, unequal, and oppressive tax and assessment upon the polls and estates of the inhabitants of said town of B., called the ministerial tax, and signed the same with their hands in their capacity of assessors, as aforesaid, of the said town of B., with the intent certain of the inhabitants of the said town, whose names are to the jurors aforesaid as yet unknown, to injure, defraud, and oppress; against the peace and dignity of the Commonwealth aforesaid.

126. *For a Conspiracy to defraud an illiterate Person, by falsely reading to him a Deed of Bargain and Sale, as and for a Bond of Indemnity.*[2]

The jurors &c., upon their oath present, that A. B., C. D., and E. F., all of in the county aforesaid, yeomen, unlawfully devising and intending one G. H. to injure, deceive, and defraud, and him the said G. H. fraudulently to deprive of his property and estate, on at did unlawfully conspire,

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[1] An indictment, from which this precedent is copied, was drawn and presented to the grand jury in one of the counties of Massachusetts, but "not found." The original is in the possession of the person by whom it was drawn.

[2] This precedent contains the substance of an indictment tried in the Supreme Court of Massachusetts for the county of Kennebeck. The original indictment stated the manner in which this fraud was carried into effect; but it is not retained in this precedent, it being unnecessary.

combine, confederate, and agree among themselves, falsely and fraudulently to obtain from the said G. H. a deed of bargain and sale of a certain lot of land in said town of B., called lot No. 20, in said town of B., and that, in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had, they the said A. B., C. D., and E. F., did falsely and fraudulently prepare, make out, and fabricate a deed of bargain and sale of the said lot of land, to be signed and executed by him the said G. H., and did then and there falsely and fraudulently present the same to him the said G. H., and did then and there, falsely and fraudulently, and in pursuance of the conspiracy, combination, confederacy, and agreement aforesaid, read the same to him the said G. H. as a bond and obligation for the sum of seventy dollars, to be given by him the said G. H. to one I. J. as a consideration, that he the said G. H. should indemnify the said I. J. against the payment of certain notes of hand which he the said G. H. had, before the day aforesaid, made and given to one K. L.; he the said G. H. being then and there an illiterate person, and by reason thereof, wholly unable to read the deed, so as aforesaid falsely and fraudulently made out and presented to him; against the peace and dignity of the Commonwealth aforesaid.

127. *For a Conspiracy to obtain Goods upon Credit, and then to abscond, and defraud the Vendor thereof.*[1]

The jurors &c., upon their oath present, that A. B., C. D., and E. F., all of in the county aforesaid, traders, wickedly and unjustly devising and intending one G. H. to defraud and cheat of his goods, property, and merchandises, on at did falsely and fraudulently conspire, combine, confederate, and agree among themselves, to obtain and get into their hands and possession, of and from the said G. H., his goods, property, and merchandises, upon trust and credit, and then to abscond out of the said Commonwealth, and defraud him thereof; and that the said A. B., C. D., and E. F., in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had, did then and there falsely and fraudulently obtain and get into their hands and possession, of and from the said G. H., goods, wares, and merchan-

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[1] See the report of this case, *Commonwealth* vs. *Ward et al.*, 1 Mass. R. 473, in which the original indictment is stated. The superfluous matter in the indictment, *viz.* the averment of the several overt acts, is not retained in this precedent, being unnecessary. See precedent, No. 120, note (2.) *ante.*

dises, of the value of five hundred dollars, upon trust and credit; and in further pursuance of the conspiracy, combination, and confederacy aforesaid, so as aforesaid had among themselves, they the said A. B., C. D., and E. F., before the time of payment for the said goods, property, and merchandises had arrived, did abscond and go out of the said Commonwealth, and did then and there, in manner aforesaid, cheat and defraud the said G. H. of his goods, property, and merchandise aforesaid; against the peace and dignity of the Commonwealth aforesaid.

128. *For a Conspiracy to manufacture spurious Indigo, with Intent to sell the same as genuine Indigo of the best Quality.*[1]

The jurors &c., upon their oath present, that A. B., C. D., and E. F., all of B., in the county of S., laborers, devising and fraudulently intending to acquire and get into their hands and possession the monies, goods, and property of the citizens of this Commonwealth, by fraudulent and dishonest means, on at did falsely, fraudulently, and unlawfully conspire, combine, confederate, and agree among themselves, to mix, compound, and manufacture certain articles and materials hereafter mentioned, into the form and color and to the resemblance of good and genuine indigo of the best quality, and of foreign growth and manufacture, with the fraudulent intent and design, that the base material, to be mixed, compounded, and manufactured as aforesaid, should be exposed to sale, and that the same should in fact be sold to the citizens of this Commonwealth and others as and for good and genuine indigo of the best quality and of foreign growth and manufacture. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., C. D., and E. F., in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had among themselves, on the day and year last

[1] See a full report of this case, *Commonwealth* vs. *Judd et al.* 2 Mass. R. 329, in which the law relative to the form and substance of an indictment for a conspiracy is most clearly and satisfactorily settled. See precedent, No. 120, note (2.), *ante*. The latter part of the indictment in this case, alleging the actual sale of the spurious indigo, is left out of this precedent, which is conformable to the decision of the court. The Chief Justice and defendants' counsel speak of the *different counts* in the indictment. There was but one count in the indictment, and when the second and third counts are referred to, it can apply only to the different allegations in the body of the indictment, introduced as usual, by the words, "And the jurors aforesaid, upon their oaths aforesaid, do further present."

aforesaid, at B. aforesaid, in the county aforesaid, did fraudulently mix and compound, with a certain quantity of genuine indigo of foreign growth and manufacture, certain other articles and materials, to wit, starch, blue vitriol, nutgalls, alum, and a decoction of logwood, in such quantities and proportions, as thereby to increase the quantity of the aforesaid genuine indigo, when mixed and compounded as aforesaid, to three times the quantity and number of pounds' weight thereof, and having so mixed and compounded the same, did then and there so manufacture and work up the same and the base materials and composition aforesaid, as to give the same the false appearance and resemblance of good and genuine indigo of the best quality and of foreign growth and manufacture, and with the fraudulent intent and purpose, that the purchaser or purchasers thereof should be cheated and defrauded; against the peace and dignity of the Commonwealth aforesaid.

129. *For a Conspiracy by Persons confined in Prison, to effect their own Escape, and that of others.*[1]

The jurors &c., upon their oath present, that A. B., C. D., and E. F., all of said B., laborers, on at were persons lawfully confined in the Commonwealth's prison, situated in B., in the county aforesaid, and then and there lawfully detained in the custody of the keeper of said prison, by divers legal processes then and there in force against them the said A. B., C. D., and E. F., [*state the cause of the detention of each of the defendants*,] and that said A. B., C. D., and E. F., unlawfully contriving and intending to effect the escape of themselves and divers other persons, to the said jurors unknown, who were then and there prisoners lawfully confined in the said prison, and in the custody of the keeper thereof, from out of said prison, did then and there conspire, combine, confederate, and agree together, unlawfully to effect the escape of themselves the said A. B., C. D., and E. F., and the said other prisoners, then so lawfully confined in said prison, from and out of the same; against the peace and dignity of the Commonwealth aforesaid. [*The same form may be used when the design of the conspirators is to effect their own escape only, and not that of others, by omit-*

[1] 2 Chitt. C. L. 1149, where it is said that this precedent is from 4 Wentw. 117. "It neither states an overt act, nor that any thing was done in pursuance of the conspiracy; which has been holden sufficient." 1 Salk. 174, 2 Lord Raym. 1167. See precedent, 120, note (2), *ante; Commonwealth* vs. *Judd et al.* 2 Mass. R. 329.

ting the allegation, "of divers other persons then and there lawfully confined in said prison," &c. The causes of detainer may also be omitted. Chitt. 1150.]

130. *For a Conspiracy, by Prisoners, to effect their Escape, and breaking down part of the wall of the Prison.*[1]

The jurors &c., upon their oath present, that A. B., C. D., and E. F., all of   laborers, at the time next hereafter mentioned, were prisoners, lawfully confined in the Commonwealth's prison situated at B., in the county aforesaid, and then and there lawfully detained in the custody of the keeper of said prison by divers legal processes then in force against them; and that they the said A. B., C. D., and E. F., unlawfully contriving and intending to break down, demolish, prostrate, and destroy part of the wall belonging to and inclosing the said prison, and thereby unlawfully to effect the escape of themselves, the said A. B., C. D., and E. F., and divers other prisoners then lawfully confined in said prison, and in the custody of the keeper thereof, from and out of the same, on   at   in the county aforesaid, did unlawfully conspire, combine, confederate, and agree among themselves, and meet together for the purposes aforesaid; and being so assembled and met together, did then and there, in pursuance of the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had among themselves, unlawfully, and wickedly begin to break down, demolish, prostrate, and destroy part of the said wall, with intent thereby unlawfully to effect the escape of themselves and the said other prisoners so there confined in the said prison, and in the custody of the keeper thereof; against the peace and dignity of the Commonwealth aforesaid.

131. *For a Conspiracy by Prisoners, and attempting to blow up the Wall of a Prison with Gunpowder.*[2]

The jurors &c., upon their oath present, that A. B., C. D., and E. F., all of   in the county of   laborers, at the time next hereafter mentioned, were prisoners lawfully confined in the Commonwealth's prison, situated in B. aforesaid, in the county aforesaid, and then and there lawfully detained in the

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[1] 3 Chitt. C. L. 1150. This precedent is said to be abridged from Cro. C. C. 422.

[2] 3 Chitt. C. L. 1151. The same form may be adopted, omitting to state that the defendants were prisoners.

custody of the keeper of said prisoners, by virtue of divers legal processes then in legal force against them; and that the said A. B., C. D., and E. F., contriving and intending to break down, blow up, demolish, prostrate, and destroy a certain part of the wall of said prison belonging to and enclosing the same, and thereby to effect the escape of themselves and of divers other prisoners, then lawfully confined in said prison, and in the lawful custody of the keeper thereof, from and out of the said prison, on the day of now last past, at in the county aforesaid, did unlawfully and wickedly conspire, combine, confederate, and agree among themselves for the purpose aforesaid; and that in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had among themselves, they the said A. B., C. D., and E. F. did then and there make and cause and procure to be made a certain large hole and breach in the said wall of the said prison, of the length of six feet, and of the width of six feet; and then and there unlawfully and wickedly put, placed, and laid a large quantity of gunpowder, to wit, ten pounds of gunpowder, into the said hole and breach, so as aforesaid made in the wall aforesaid, with intent to set fire to the said gunpowder, and thereby to break down, blow up, demolish, prostrate, and destroy part of the said wall, and by the means last mentioned to effect the escape of themselves and the said other prisoners so confined in the said prison, and in the lawful custody of the keeper thereof, from and out of the same; against the peace and dignity of the Commonwealth aforesaid.

132. *For a Conspiracy to persuade a Man not to give Evidence against One committed for Trial.*[1]

The jurors &c., upon their oath present, that at the time of the conspiracy, combination, confederacy, and agreement hereafter mentioned, one A. B. was a prisoner in the Commonwealth's gaol, situated in B., in the county aforesaid, lawfully committed and charged with a certain felony, before that time by him committed, and a certain indictment was about to be preferred against him the said A. B. for the said felony, and that one C. D. was a material witness in support of such bill of indictment; and that E. F. and G. H., both of in the county aforesaid, laborers, well knowing the premises, and contriving and intending to pre-

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[1] 3 Chitt. 1155, 1156. See other counts in the indictment in Chitty. The 4th, without alleging any overt act, was held good. See the two next precedents, No. 132, and 133, and the authorities there quoted.

vent the due course of law and justice, and to prevent the said C. D. from attending as a witness in support of said bill of indictment about to be preferred as aforesaid, on at and while the said A. B. was a prisoner in the said prison as last aforesaid for the said felony, wilfully and corruptly did conspire, combine, confederate, and agree among themselves to induce the said C. D. to suppress the evidence he knew concerning said felony, and to prevent the said C. D. from attending to give evidence as a witness in support of said bill of indictment against the said A. B., so about to be preferred against him as aforesaid; against the peace and dignity of the Commonwealth aforesaid.

133. *Another Form for the same Conspiracy, without averring any Overt Act.*[1]

The jurors &c., upon their oath present, that A. B., C. D., and E. F., all of in the county of laborers, being evil disposed persons and well knowing that a certain bill of indictment for felony was intended, and about to be preferred against one G. H., and that one I. J. was a material witness in support of such bill of indictment, on at in the county aforesaid, did unlawfully and wickedly conspire, combine, confederate, and agree together, to induce the said I. J. to suppress the evidence he knew, and which was within his knowledge touching the said felony, and to withdraw and conceal himself, in order to prevent his being examined as a witness in support of said bill of indictment, so as aforesaid intended to be preferred; against the peace and dignity of the Commonwealth aforesaid.

134. *For a Conspiracy to cheat Another, without alleging any Overt Act.*[2]

The jurors &c., upon their oath present, that A. B. and C. D., both of B., in the county aforesaid, yeomen, being evil disposed persons, and devising and intending one E. F. to injure and defraud, on the day of at in the county aforesaid, did unlawfully conspire, combine, confederate, and agree together, the said E. F. to injure, cheat, and defraud of his monies, goods,

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[1] See 3 Chitt. 1156, who says this count is good, and cites 1 Salk. 174; 2 Ld Raym. 1167. See also *ante*, precedent No. 120, note (2).

[2] This form, concise as it is, will be sufficient and valid upon the authorities referred to in precedent No. 120, note (2). See also 3 Chitt. 1136, a count for a general conspiracy, stating no overt act whatever.

and chattels; against the peace and dignity of the Commonwealth aforesaid.

Correction, House of. — See "Nuisance."

Counterfeiting. — See "Forgery."

Deceit. — See "Cheats."

Duelling. — See "Challenges to Fight."

ELECTIONS.

135. *Indictment for fraudulently voting at an Election of Governor, &c.*[1]

The jurors &c., upon their oath present, that on the first Monday of April now last past, (it being the sixth day of said month) the male inhabitants of the town of   in the county of   were convened according to the constitution and laws of this Commonwealth, in legal town meeting, for the choice and elaction of governor, lieutenant governor, counsellors, and senators for this Commonwealth, for the year then next ensuing, and now current; at which meeting of said inhabitants, A. B., of B., in the county aforesaid, yeoman, appeared to give in his vote and list of persons to be voted for, at the choice and election aforesaid; he the said A. B. being then and there one of the male inhabitants of said town of   and legally qualified to give in his vote and list at the choice and election aforesaid; and that he the said A. B., being a person regardless of the rights of the people, and of the freedom and purity of elections in this Commonwealth, and of the several laws thereof made to regulate and preserve the same, on the said sixth day of April,

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[1] This precedent is founded upon the 3d section of the statute of Massachusetts of 1800, c. 74, § 3, and is in the same form of those that have been used and sanctioned in the Suprume Judicial Court of Massachusetts. Indictments at common law have also been maintained in that court against officers of towns, for abuse of their powers in conducting the public elections, upon the principle of the common law, that there is an implied engagement in the acceptance of all offices, that they shall be faithfully executed.

in the year aforesaid, at B. aforesaid, in the county aforesaid, did knowingly and designedly, give in more than one vote and list of persons to be elected and chosen into the said offices, at one time of balloting, at the choice and election aforesaid; against the peace of said Commonwealth, and contrary to the form of the several statutes in such case made and provided.[1]

136. *Against the Selectmen of a Town, for fraudulently admitting Persons not qualified to vote at an Election.*[2]

The jurors &c., upon their oath present, that on the first Monday of April now last past, (it being the sixth day of said month,) the male inhabitants of the town of Northfield in the county of Franklin, were duly and legally convened in public town meeting, according to the constitution and laws of this Commonwealth, for the purpose of giving in their votes and lists at the choice and election of governor, lieutenant governor, counsellors, and senators of this Commonwealth for the year then ensuing and now current, at which said town meeting A. B., C. D., and E. F., all of whom were the selectmen of the said town of Northfield for the year aforesaid, having been legally chosen and sworn into that office, appeared to preside at and to regulate said town meeting, and did then and there undertake to preside at and regulate said meeting, according to their oath and duty in that behalf; and that the said A. B., C. D., and E. F., selectmen as aforesaid, being persons regardless of the rights of the people, and of the freedom and purity of elections, and of the constitution and laws of this Commonwealth regulating the same, on the said sixth day of April aforesaid, at Northfield aforesaid, in the county aforesaid, *did knowingly and corruptly neglect and refuse to comply with and perform their several duties respectively required of them by law, as pointed out in and by the constitution and laws of this Commonwealth;* that is to say, the said A. B., C. D., and E. F., when presiding at said

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[1] In the case of this offence of fraudulent voting, there are several statutes in force, creating the offence and increasing the penalty. This precedent therefore concludes "against the form *of the several statutes*," &c.

[2] This was the indictment against the selectmen of Northfield, tried in the Supreme Court in the county of Hampshire. It might be condensed consistently with its validity. As the offence is not expressly created by statute, it is advisable to conclude the indictment both at common law and upon the "several statutes." See statute 1806, c. 26, § 4, as to the oath of selectmen. The words in italics in the body of this precedent, contain the susbtance and words of this oath.

town meeting and regulating the same in their said office and capacity of selectmen as aforesaid, did then and there knowingly and corruptly admit one Lewis Field, one Robert Trip, and one James Robinson, to give in their several votes and lists, at the town meeting and choice aforesaid; and did then and there knowingly and corruptly receive the votes and lists of persons to be then and there voted for, elected, and chosen into the offices aforesaid, of them the said Lewis Field, Robert Trip, and James Robinson, when in truth and in fact, they had no right to vote and give in their lists of persons to be voted for, elected, and chosen into the offices aforesaid, at said meeting and choice, and had not the qualifications required by the constitution and laws of this Commonwealth to vote and give in their lists of persons to be voted for, elected, and chosen into the offices aforesaid, at the meeting and choice aforesaid; that is to say, the said Lewis Field was not an inhabitant of the said town of Northfield, on the said sixth day of April aforesaid, and did not dwell and had not his home therein; and that the said Robert Trip and James Robinson, on the said sixth day of April aforesaid, or at any other time, had not, nor had either of them, a freehold estate within the said Commonwealth, of the annual income of ten dollars, or any estate of the value of two hundred dollars; of all which the said A. B., C. D., and E. F. were then and there well knowing. And the jurors aforesaid, upon their oath aforesaid, do further present, that the same votes and lists of the said Lewis Field, Robert Trip, and James Robinson, so as aforesaid knowingly and corruptly admitted and received by them the said A. B., C. D., and E. F., they the said A. B., C. D., and E. F. did knowingly and corruptly cause to be recorded and returned upon the lists of persons vóted for as governor, lieutenant governor, counsellors, and senators for the year aforesaid, at the meeting and choice aforesaid; which list, containing the votes of said Field, Trip, and Robinson, they the said A. B., C. D., and E. F. did knowingly and corruptly transmit, and cause to be transmitted to the office of the secretary of this Commonwealth, according to the direction of the law and constitution of this Commonwealth; they the said A. B., C. D., and E. F., well knowing that the said Field, Trip, and Robinson were not qualified according to the constitution and laws of this Commonweath to vote and give in their lists of persons to be voted for, elected, and chosen into the offices aforesaid; in violation of the oath and duty of them the said A. B., C. D., and E. F. in their said offices of selectment of said town of Northfield; against the

peace and dignity of said Commonwealth, and contrary to the form of the several statutes in such case made and provided.[1]

EMBRACERY.

137. *For Embracery, by persuading a Juror to give his Verdict in Favor of the Defendant, and for soliciting the other Jurors to do the like.*[2]

The jurors &c., upon their oath present, that A. B., of in the county aforesaid, yeoman, on at in said county of B., knowing that a certain jury of the said county of B. was then duly returned, impannelled, and sworn, to try a certain issue joined in the Supreme Judicial Court, then held and in session according to law, at B. aforesaid, in and for the said county of B., between C. D., plaintiff, and E. F., defendant, in a plea of the case; and then also knowing that a trial was to be had upon the said issue, on the day of in the year aforesaid, before the said Supreme Judicial Court then and there held for the said county of B., the said A. B., wickedly and unlawfully intending and devising to hinder a just and lawful trial of the said issue by the jurors aforesaid, returned, impannelled, and sworn as aforesaid, to try the said issue, on at in the county aforesaid, unlawfully, wickedly, and unjustly, on behalf of the said E. F., the defendant in the said cause, did solicit and persuade one G. H., one of the jurors of the said jury, returned, impannelled, and sworn according to law for the trial of said issue, to appear and attend in favor of the said E. F., the said defendant in the said cause, and then and there did utter to the said G. H., one of the jurors as aforesaid,

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[1] This indictment was tried as stated in the preceding note. No objection was made to it. It may be a question, however, whether the several defendants could be joined. The offences are several and different; the deficiencies in the qualifications of the voters are alleged to be different, would require different proof, and admit of distinct defences, depending upon facts independent and different in their nature.

[2] This precedent is taken, in substance, from a similar precedent in Trem. P. C. 176, and is the only one to be met with, either in that collection, or in Coke's Entries, Chitt. C. L., Stark. C. P., Cro. C. C., or Cro. C. A. There are two other precedents in an ancient book, containing precedents of indictments, informations, &c., entitled "*Officium Clerici Pacis.*"

divers words and discourses, by way of commendation, on behalf of him the said E. F., the said defendant, and in disparagement of the said C. D., the plaintiff; and that he the said A. B. did then and there unlawfully and corruptly move and desire the said G. H. to solicit and persuade the other jurors, returned, impannelled, and sworn to try the said issue, to give a verdict for the said E. F., the defendant in the said cause, he the said A. B. then and there well knowing, that the said G. H. was one of the jurors returned, impannelled, and sworn to try the said issue; and that the jurors of said jury, by reason of speaking and uttering the words and discourses aforesaid, did give their verdict for the said E. F., the said defendant in the cause aforesaid; against the peace and dignity of the Commonwealth aforesaid.[1]

ESCAPE.

138. *Indictment at Common Law for escaping from a Constable, being in Custody under a Warrant for Larceny.*[2]

The jurors &c., upon their oath present, that A. B., of B., in the county aforesaid, gentleman, he the said A. B. being a constable of the said town of B., duly and legally authorized to execute and perform the duties of that office, on at in the county aforesaid, did take and arrest one C. D., by virtue of a warrant from E. F., Esquire, one of the justices of the peace in and for the county aforesaid, on suspicion of having committed a certain felony, in feloniously stealing, taking, and carrying away one gelding, of the value of dollars, of the property of one G. H.; and that thereupon he the said C. D., under the custody of him the said A. B., the constable as aforesaid, was then and there brought before the said E. F., Esquire, one of the justices of the peace in and for the county aforesaid, duly authorized to discharge and perform the duties of that office. Whereupon such proceedings were had, that the said E. F., Esquire, by his warrant of commitment, directed to him

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[1] The last allegation in this precedent, *viz.* that the jury gave their verdict for defendant by reason of the solicitations, &c. is not necessary. The crime is complete by the *attempt*, whether it succeed or not. Hawk. b. 1, c, 85, § 1 & 2, and authorities there quoted.

[2] 2 Chitt. C. L. 159; Stark. 602, 608; Cro. C. C. 188.

the said A. B., did then and there command the said A. B. to convey the said C. D. to the gaol of said Commonwealth, at B. aforesaid, in the county aforesaid, there to be safely kept until he should be lawfully delivered thence by due course of law; by virtue of which warrant the said C. D. was then and there taken and detained by him the said A. B.; and that, as he the said A. B. was conveying and carrying him the said C. D. to the gaol aforesaid afterwards, to wit, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, he the said C. D. did forcibly break away and escape from and out of the custody of him the said A. B., constable as aforesaid, against the will of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid.

139. *Against a Prisoner in Custody, for breaking out of Gaol.*[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of laborer, on the day of now last past, at B., in the county aforesaid, was arrested, detained, and imprisoned in the Commonwealth's gaol, situated in B. aforesaid, in the county aforesaid, for a certain felony by him committed, that is to say, for feloniously stealing, taking, and carrying away one gelding, of the value of one hundred dollars, of the goods, chattels, and property of one C. D., and that he the said A. B., on at with force and arms, the aforesaid gaol of the said Commonwealth did forcibly break, and thereby did then and there escape from and out of the said gaol; against the peace and dignity of the Commonwealth aforesaid.

140. *Against a Constable for a negligent Escape.*[2]

The jurors &c., upon their oath present, that on the day of now last past, at B. aforesaid, in the county afore-

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[1] 2 Chitt. C. L. 160, where it is said this precedent is taken from Burn J., *Prison-breaking;* Williams J., *Escape,* III. It is remarkable that there is no similar precedent in Stark., Cro. C. C., Cro. C. A., or Trem. P. C. I think it would be more safe and correct, that the warrant or precept, whatever it may be, should be set out at large in the indictment; but that is not the case in the precedent from which this form is taken.

[2] See similar precedents in 2 Chitt. 181; Cro. C. C. 318, (6th Ed.); 2 Stark. 605. The same form may be used in case of a voluntary escape, by substituting the word "voluntary," for the word "negligently," at the close of the indictment.

said, one A. B. came before C. D., Esquire, then one of the justices of the peace in and for the county aforesaid, duly and legally qualified and empowered to discharge and perform the duties of that office, and that the said A. B. did then and there, on his oath before said justice, charge, accuse, and complain, that one E. F., of B. aforesaid, laborer, [*here set forth the complaint.*] Whereupon such proceedings were had, that the said justice did then and there make a certain warrant under his hand and seal, in due form of law, directed to the sheriff of the said county of or his deputy, or to any of the constables of the town of in the county aforesaid, thereby requiring them and each of them to take the body of the said E. F., and bring him before the said C. D., the justice aforesaid, to be dealt with, touching said complaint, as to law and justice might appertain; which said warrant afterwards, on the day and year aforesaid, at B. aforesaid, was delivered to I. J., of said B., in the county aforesaid, yeoman, (he being then and there one of the constables of the said town of B., duly appointed, qualified, and sworn to discharge and perform the duties of said office,) in due form of law to be by him served and executed; by virtue of which warrant the said I. J. afterwards, to wit, on the day of at B. aforesaid, in the county aforesaid, did take and arrest the body of him the said E. F., and him in his custody for the cause aforesaid then and there had. Nevertheless the said I. J. afterwards, to wit, on the day of in the year aforesaid, at B. aforesaid, in the county aforesaid, the duties of his office in that respect not regarding, unlawfully and negligently did permit the said E. F. to escape and go at large wheresoever he would, out of the custody of him the said I. J., whereby the said E. F. did then and there escape and go at large, out of the custody of the said I. J.; against the peace and dignity of the Commonwealth aforesaid.

141. *Against a Gaoler, for a voluntary Escape of a Prisoner convicted of Felony.*[1]

The jurors &c., upon their oath present, that at the Supreme Judicial Court of said Commonwealth, begun and holden at [*here set forth the time and place of holding the Court,*] one A. B. was duly and legally convicted of the crime of larceny, in feloniously stealing, taking, and carrying away fifty pounds' weight of

[1] This precedent is drawn upon the third section of the Statute of Massachusetts of 1784, c. 41, but it would doubtless be good at common law, and the precedent so concludes.

tea, of the value of thirty dollars, of the goods and chattels of one C. D., whereupon it was considered, ordered, and adjudged by the said court, that [*here set forth the sentence of the court*,] as by the record thereof and proceedings remaining among the records of said court more fully appears. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, at the Supreme Judicial Court abovementioned, the said A. B., by order of said court, was committed to the keeping and custody of E. F., of in the county of gentleman, then and still the gaoler and prison-keeper of the Commonwealth's gaol, situated at B., in the county aforesaid, there to be kept and imprisoned in the said gaol and prison, according to, and in pursuance of the order and sentence aforesaid; and the said E. F. him the said A. B. in his custody then and there had for the cause aforesaid. he the said A. B. having stood charged and been convicted as aforesaid of the aforesaid felony and larceny, and thereupon committed as a prisoner as aforesaid to him the said E. F. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. F., of B., in the county aforesaid, gentleman, afterwards and before the expiration of the term for which the said A. B. so as aforesaid was ordered to be imprisoned, to wit, on the day of at B. aforesaid, in the county aforesaid, unlawfully, voluntarily, and contemptuously, did permit and suffer the said A. B. to escape and go at large out of the said gaol and prison; against the peace and dignity of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided.[1]

142. *For conveying Instruments into a Prison, with Intent to facilitate the Escape of a Prisoner.*[2]

The jurors &c., upon their oath present, that heretofore, to wit, on the day of now last past, at B. aforesaid, in the county aforesaid, A. B., Esquire, then being one of the justices of the peace in and for the said county of duly and legally authorized and qualified to discharge and perform the duties of that office, did make out his warrant of commit-

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[1] The same form may be used in the case of a negligent escape, by substituting the word "negligently," for the word "voluntarily," at the close of the indictment.

[2] This precedent is drawn upon the second section of the statute of Massachusetts of 1784, c. 41. It also concludes at common law. See a similar precedent in Stark. 612, drawn upon the statute of 16 Geo. 2, c. 31, § 1; also another in Cro. C. A. 328.

ment, in due form of law, bearing date the day and year aforesaid, directed to the keeper of the Commonwealth's gaol in aforesaid, his under-keeper, or deputy; by which said warrant of commitment, the said justice did require the keeper of said gaol, his under-keeper, or deputy, to receive into their custody the body of one C. D., who was therewith sent to them the said keeper, his under-keeper, or deputy, (the said C. D. having been brought before him the said justice, and charged, upon the oath of E. F., with having feloniously taken, stolen, and carried away a certain gelding, of the value of dollars, the property of him the said E. F.,) and him the said C. D. safely to keep until he should be discharged by due course of law; which said warrant of commitment is as follows, [*here set forth the warrant of commitment.*] By virtue of which said warrant, the said C. D. afterwards, to wit, on the same day and year aforesaid, at B. aforesaid, was conveyed, committed, and delivered to the Commonwealth's said gaol, situated in said B., and to the keeper thereof, for the cause aforesaid, to wit, for the felony and larceny aforesaid; and the said C. D. was then and there lawfully detained and kept a prisoner in the aforesaid gaol, under the custody of I. J., Esquire, then the keeper of said gaol, for the felony aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that K. L., of in the county aforesaid, laborer, on the day of at B. aforesaid, in the county aforesaid, did unlawfully convey, and did cause and procure to be unlawfully conveyed into the said gaol and prison, two steel files, being instruments proper to facilitate the escape of prisoners out of the gaol and prison aforesaid, and the same files did then and there deliver, and cause and procure to be delivered to the said C. D., (he being then and there a prisoner in said gaol and prison, and then and there lawfully detained therein for the felony and larceny aforesaid,) without the knowledge and privity of said keeper of said gaol and prison, or of any under-keeper of the same, which said files, being such instruments as aforesaid, were then and there so conveyed into the said gaol and prison, and delivered to the said C. D. as aforesaid, by him the said K. L., with an intent that he the said C. D. might thereby and therewith break the said gaol and prison, and unlawfully work himself out of the same, and with intent to aid and assist the said C. D. to escape and attempt to escape from and out of the said gaol and prison; against the peace and dignity of the said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

[1] This form will answer when the prisoner actually escapes, by inserting the

143. *Against a Prisoner confined in Gaol, for attempting to break the Gaol in order to make his Escape.*[1]

The jurors &c., upon their oath present, that A. B., of in the county of laborer, on the day of now last past, at B., in the county aforesaid, was arrested, detained, and imprisoned in the Commonwealth's gaol, situated in B. aforesaid, for [*here set forth the warrant or precept upon which the prisoner was committed*,] and that he the said A. B., being a prisoner lawfully detained in the gaol aforesaid, and in the custody of the keeper thereof, for the cause aforesaid, on at B. aforesaid, in the county aforesaid, with force and arms, unlawfully and wilfully did attempt to break the aforesaid gaol, and to escape and go at large from and out of the same gaol, by then and there cutting and sawing asunder two iron bars of the said gaol, and also by then and there breaking, cutting, and removing a great quantity of stone, parcel of the wall of said gaol; against the peace and dignity of the Commonwealth aforesaid.[2]

EXTORTION.

144. *Indictment against a Justice of the Peace for Extortion: On the sixth Section of the Statute of Massachusetts.*[3]

The jurors &c., upon their oath present, that A. B., of &c., Esquire, on the day of &c., then being one of the justices

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words in the latter clause of the section, *viz.* "that if any prisoner shall make his escape by means of any instrument," &c.

[1] Stark. 608, (a similar precedent, but a defective one; see note (*a.*) to the precedent;) 2 Chitt. 164, 165; Cro. C. A. 219. These precedents are all alike; but they may be safely abridged.

[2] There is a precedent in Stark. 602, and another in Chitt. 162, against a person for *aiding* a prisoner to escape by assisting him to break the prison. It would be more correct to proceed against them both as principals, as in misdemeanors *all* are principals. The same remark is applicable to the precedents in Stark. 606; 2 Chitt. 176; Cro. C A. 216, against a *turnkey* of a prison, for aiding and assisting a prisoner to escape by breaking the gaol.

[3] Stat. 1795, c. 41, § 6. By this section the prosecution is limited to one year from the time when the offence is committed. This form may be adopted, *mutatis mutandis*, for extortions by all other officers and persons mentioned in the aforesaid statute.

of the peace in and for the county of duly and legally appointed and qualified to perform the duties of that office, not regarding the duties of said office, but contriving and intending one C. D. to injure and oppress, on the said day of in the year aforesaid, at in the county aforesaid, by color of his said office, did wilfully, corruptly, and extorsively demand, take, and receive of him the said C. D. a greater fee than is allowed and provided by law for the trial of a certain issue, then and there in due form of law joined and pending before him the said A. B., as a justice of the peace for the said county of between the aforesaid C. D. and one E. F., in a certain civil action commenced and entered by the said C. D. against the said E. F. before him the said A. B., justice of the peace as aforesaid, at a Justice's Court duly appointed, and then and there held by him the said A. B., to wit, the sum of for the trial of the said issue, which sum is more than the fee allowed and provided by law for the service aforesaid; contrary to the duty of him the said A. B. in his office aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

145. *Against a Constable, for taking Money under Pretence of getting the Party discharged without any Proceedings to be had before a Justice of the Peace.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on the day of &c., at &c., being then and still one of the constables of the town of in the county aforesaid, did arrest and take into his custody one C. D., by virtue of a warrant duly issued by one E. F., Esquire, then and still being one of the justices of the peace in and for the county aforesaid, duly and legally appointed, authorized, and empowered to discharge and perform the duties of said office, directed to [*here insert the warrant;*] and the said C. D., so being in custody as aforesaid, for the purpose aforesaid, to answer the complaint aforesaid, he the said A. B. did then and there fraudulently, unlawfully, and injuriously demand, have, receive, and obtain of and from him the said C. D. the sum of upon pretence and color, that he the said A. B. would procure and obtain a discharge of said warrant, without any proceedings being had thereon; whereas in truth and in fact the said A. B. did not procure and obtain a

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[1] This precedent is altered from one in 2 Chitt. C. L. 293, where other precedents are quoted from 4 Wentw. 146, 147; Burns J. *Extortion;* Williams J. *Extortion;* Cro. C. C. 327–330, (6th Ed.)

discharge of said warrant; against the peace and dignity of the Commonwealth aforesaid.

146. *Against a Constable for extorting Money of a Person apprehended by him upon a Warrant, to let him go at large.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at in the county aforesaid, then and there being one of the constables of the town of in the county aforesaid, did take and arrest one C. D. by virtue of a warrant duly made and issued, which he the said A. B. then and there had, directed, &c. [*here insert the warrant;*] and that the said A. B. him the said C. D. then and there had in his custody by virtue of the said warrant, and that the said A. B. afterwards, to wit, on at in the county aforesaid, unlawfully, corruptly, and extorsively, for the sake of gain, and contrary to the duty of his said office, did extort, receive, and take of and from the said C. D. the sum of for discharging the said C. D. out of the custody of him the said A. B, constable as aforesaid, without conveying the said C. D. before any justice of the peace in and for said county, or before any other lawful authority, to answer to the charges, matters, and things, whereof he stood accused and charged as aforesaid; against the peace and dignity of the Commonwealth aforesaid.

147. *Against a Justice of the Peace for extorting Fees for discharging a Recognisance, and for not returning the same to the Court for which it was taken.*[2]

The jurors &c., upon their oath present, N. J., of &c., on &c., and continually afterwards, until the day of the taking of this inquisition, was, and yet is, one of the justices of the peace within and for the said county of &c., duly and legally appointed and authorized to discharge the duties of that office. Nevertheless the said N. J., not regarding the duties of his said office, but perverting the trust reposed in him, and contriving and intending the citizens of this Commonwealth, for the private gain

[1] 2 Chitt. 295, 296; Cro. C. C. 327, (6th Ed.); 2 Stark. 585. See other precedents for extortion in 2 Chitt. 296, 297; Cro. C. C. 327; 1 Trem. P. C. 111–115; 2 Chitt. 300, against a collector for extorting money by color of his office.

[2] This precedent is substantially taken from a precedent in 1 Trem. P. 119, 120. No authority or other precedent is referred to. I think this precedent would be more correct if the indictment alleged the particular nature and condition of the recognisance, and also that the magistrate was authorized to take it.

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of him the said N. J., to oppress and impoverish, and the due execution of justice, as much as in him lay, to hinder, obstruct, and destroy, on the day of and between that day and the day of the finding of this bill, at aforesaid, in the county aforesaid, under color of his said office of justice of the peace for the said county of a certain sum of money, to wit, the sum of for not returning a certain recognisance before him, within the time aforesaid, taken for the appearance of one G. J. at a certain term of the [*here describe the court to which the recognisance was made returnable*,] to be holden next after the taking of the recognisance aforesaid from the said G. J., unlawfully, unjustly, and extorsively did exact, receive, and have; and although the said next court of [*here describe the court*,] for the county aforesaid, after the taking of the recognisance aforesaid, and to which the said recognisance ought to have been returned, was held at in the county aforesaid, on the Tuesday of in the year aforesaid, in the due course of law, the said N. J. the said recognisance, to the court aforesaid, as of right, and according to his duty and the laws of said Commonwealth he ought to have done, did not return, but *suppressed* the same, against the duties of his said office, to the great hindrance of justice, and against the peace and dignity of the Commonwealth aforesaid.

FORCIBLE ENTRY AND DETAINER.

148. *Indictment for a Forcible Entry and Detainer, at Common Law.*[1]

The jurors &c., upon their oath present, that A. B., of &c., and C. D., of &c., together with divers other evil disposed persons, whose names to the jurors aforesaid are as yet unknown, on at with force and arms, *and with a strong hand*,[2] unlawfully, forcibly, and injuriously, did enter into [*here describe the premises according to the fact, and as accurately as is required in a declaration in ejectment*,] then and there being in the peaceable possession of one E. F., and situate and being in the said town of in the county aforesaid; and that the said A. B.

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[1] 3 Chitt. 1124. See similar precedents, in Stark. 422; Cro. C. C. 331; 8 T. R. 357; 1 Russ. P. 407, note 1, (Davis's Ed.)

[2] This allegation is essential. 8 T. R. 357.

and C. D., together with the said evil disposed persons, then and there with force as aforesaid, and with a strong hand, unlawfully, violently, forcibly, and injuriously did expel, amove, and put out the said E. F. from the possession of the said premises with the appurtenances, and the said E. F., so as aforesaid expelled, amoved, and put out from the possession of the same, with force and arms and with a strong hand, unlawfully, violently, forcibly, and injuriously have kept out, from the day and year aforesaid, until the taking of this inquisition, and still do keep out, and other wrongs to the said E. F. then and there did, to the great damage of him the said E. F., and against the peace and dignity of the Commonwealth aforesaid.[1]

The proceedings, in cases of Forcible Entry and Detainer are regulated by statute in the several States. The proceeding by indictment at common law is unknown in Massachusetts.

FORESTALLING, ENGROSSING, AND REGRATING.

149. *For forestalling Lambs in their Way to a public Market.*[2]

The jurors &c., upon their oath present, that A. B., of in the county aforesaid, yeoman, on at did buy and cause to be bought of one C. D. thirty lambs, then and there coming and being driven towards a certain market in the city of Boston and county of Suffolk, for the sale of all kinds of provisions, called Faneuil Hall Market, for the purpose of being exposed to sale and sold in the said market, and before the same were brought into the said market where the same should have been sold; against the peace and dignity of the Commonwealth aforesaid.

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[1] There are two other precedents in Chitty similar to the foregoing, excepting that they conclude upon the ancient English statutes. The last precedent (p. 1126) is nothing more than the form of an indictment for a riot at common law.

[2] 2 Chitt. 533. If the name of the person of whom the article was purchased be unknown, it may be alleged in the indictment, that it was "bought and caused to be bought of a person whose name is to the said jurors unknown."

150. *For Engrossing.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at aforesaid, did unlawfully engross and get into his hands, by buying of and from divers persons, to the jurors aforesaid unknown, a large quantity, to wit, one thousand bushels[2] of wheat, with intent to sell the same again for lucre, gain, and at an unreasonable profit; against the peace and dignity of the Commonwealth aforesaid.

151. *For Regrating.*[3]

The jurors &c., upon their oath present, that A. B., of &c., on at in a certain market there, called the market, unlawfully did buy, obtain, and get into his hands and possession, of and from one C. D., a large quantity of to wit, one hundred pounds' weight of at and for the price of for each and every pound of the said and that afterwards, to wit, on the said day of he the said A. B., at aforesaid, in the county aforesaid, in the same market there, unlawfully did regrate the said one hundred pounds' weight of and did then and there sell the same again to one E. F., at and for the price of for each and every pound weight of the said with a deduction of on the whole price of the said one hundred pounds' weight of being allowed and thrown back by the said A. B. to the said E. F.; against the peace and dignity of the Commonwealth aforesaid.

FORGERY AND COUNTERFEITING.

152. *For forging a Promissory Note for the Payment of Money: On the first Section of the Statute of Massachusetts of* 1804, *c.* 120.[4]

The jurors &c., upon their oath present, that A. B., of &c., on the day of at in the county aforesaid, did

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[1] 2 Chitt. 534.

[2] The quantity must be stated. 1 East, 538; 2 Stark. 654.

[3] 2 Chitt. 535, 536, note (*g*), where a case is stated in which a motion in arrest of judgment was submitted, upon the ground that the act of regrating is not an offence at common law; no decision was had, the Court being equally divided. See other precedents, Cro. C. C.; 2 Stark. 654.

[4] This and the fifteen following precedents are original, and are drawn upon

falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, a certain promissory note for the payment of money, purporting to be made and signed by one C. D., for the sum of dollars, which said false, forged, and counterfeit promissory note is of the purport and effect following,[1] to wit, [*here insert a true copy of the note in the words and figures of it*,] with intent the said C. D. to injure and defraud; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[2]

153. *For forging a Certificate of a Justice of the Peace: On the first Section of the Statute.*

The jurors &c., upon their oath present, that A. B., of &c., on at in the county aforesaid, did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, a certain certificate and attestation of one C. D., Esquire, one of the justices of the peace in and for the county of which said false, forged, and counterfeit certificate and attestation is of the purport and effect following, to wit, [*here insert an exact copy of the certificate in words and figures*,] which said false, forged, and counterfeit certificate and attestation, then and there purported to be the certificate and attestation of a justice of the peace, in a matter wherein the said certificate and attestation was receivable, and might be taken as legal proof; with intent one E. F. to injure and defraud; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

154. *For uttering and publishing a forged Instrument: On the last Clause of the first Section of the Statute.*

The jurors &c., upon their oath present, that A. B., of &c., on the day of now last past, at in the county

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the several sections of the statute of Massachusetts against forgery and counterfeiting, of 1804, c. 120. They are in the same forms which have been adopted ever since the statute was enacted.

[1] This is the most proper allegation, as to the mode of describing the forged instrument. It is neither necessary nor advisable to allege it in the "tenor following." See 2 East, P. C. 957, § 53, 54.

[2] If the note forged purports to be given for specific articles, then allege it to be "a certain promissory note for the delivery of goods," as in the words of the statute.

aforesaid, had in his custody and possession a certain false, forged, and counterfeit promissory note for the payment of money, purporting to be made and signed by one C. D., for the sum of dollars; which said false, forged, and counterfeit promissory note is of the following purport and effect, to wit, [*here insert a correct copy of the forged instrument, in words and figures;*] and that he the said A. B. the aforesaid false, forged, and counterfeit promissory note did then and there utter and publish as true, with intent one E. F. to injure and defraud, he the said A. B. then and there well knowing the aforesaid note to be false, forged, and counterfeit; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

Precedents upon the Second Section of the Statute.

155. *For forging a Certificate of a public Debt.*

The jurors &c., upon their oath present, that A. B., of &c., on at did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, and did willingly aid and assist in falsely making, forging, and counterfeiting a certain note, [*or certificate or other bill of credit, as the case may be,*] purporting to be a note which had been duly issued by the treasurer of the said Commonwealth, thereto duly authorized for a debt of this Commonwealth; which said false, forged, and counterfeit note is of the purport and effect following, to wit, [*here insert an exact copy of the note or instrument in words and figures;*] with intent the said Commonwealth to injure and defraud; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[2]

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[1] The same form may be adopted for the forgery of all the different instruments mentioned in this section of the statute, making use of the precise words used in the statute to describe the instrument.

[2] If the note or certificate was issued by a commissioner or commissioners, it is to be so alleged, instead of alleging them to be issued by the treasurer. See the words of the section.

This form may be used and adapted to all the cases of uttering and publishing forged instruments which may be prosecuted upon this section of the statute.

156. *For forging a Bank Bill of a Bank incorporated within this State.*

The jurors &c., upon their oath present, that A. B., of &c., on at in the county aforesaid, did falsely make, forge, and counterfeit, and did procure to be falsely made, forged, and counterfeited, a certain bank bill, purporting to be payable to the bearer thereof, and to be signed in behalf of the president, directors, and company of the (Boston) bank, the same being a corporation, by law licensed and authorized as a bank within this Commonwealth; which said false, forged, and counterfeit bank bill is of the purport and effect following, [*here insert an exact copy of the bill in words and figures;*] with intent the said president, directors, and company of the said Boston bank to injure and defraud; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

157. *For being possessed of ten counterfeit Bank Bills at the same time, with intent to pass the same.*[1]

The jurors &c., upon their oath present, that A. B., of &c., at had in his custody and possession ten false, forged, and counterfeit bank bills, purporting to be ten bank bills payable to the bearers thereof, and to be signed in behalf of the president, directors, and company of the (Boston) bank, the same being a corporation by law, licensed and authorized as a bank within this Commonwealth, which said bank bills are of the purport and effect following, to wit, one of said bank bills being of the following purport and effect, to wit,[1] [*here you must insert a true copy of all and each of the ten bills; after inserting a true copy of the first, go on to say, one other of said bills being of the following purport and effect, and so on with the whole of them;*] and that he the said A. B. did then and there willingly aid and assist in rendering current as true, each of the false, forged, and counterfeit bank bills aforesaid, knowing them and each of them to be false, forged, and counterfeit as aforesaid, with intent to utter and pass the same, and thereby to injure and defraud the president, directors, and company of the said (Bos-

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[1] See *Brown in Error* v. *Commonwealth*, 8 Mass. R. 59, where several important points in the construction of this section of the statute are decided.

See *Commonwealth* v. *Houghton*, 8 Mass. R. 107; each bill must be described, that is, copied, in the indictment, or a sufficient reason assigned in the indictment for not doing it.

ton) bank; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

INDICTMENTS FRAMED UPON THE THIRD SECTION OF THE STATUTE.

158. *For uttering and tendering in Payment a Counterfeit Bank Bill of an incorporated Bank in Massachusetts.*

The jurors &c, upon their oath present, that A. B., of in the county aforesaid, laborer, on at had in his custody and possession a certain false, forged, and counterfeit bank bill, purporting to be a bank bill payable to the bearer thereof, and to be signed in behalf of the president, directors, and company of the (Boston) bank, the same being a corporation by law licensed and authorized as a bank within this Commonwealth; which said false, forged, and counterfeit bank bill is of the following purport and effect, to wit, [*here insert an exact copy of the counterfeit bill in words and figures;*] and that he the said A. B. the aforesaid false, forged, and counterfeit bank bill did then and there utter and tender in payment[1] as true, with intent one C. D. to injure and defraud; he the said A. B. then and there well knowing the aforesaid bank bill to be false, forged, and counterfeit; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

159. *For a Second Offence in passing a Counterfeit Bank Bill.*

The jurors &c., upon their oath present, that A. B., of in the county aforesaid, laborer, heretofore, to wit, on at had in his custody and possession a certain false, forged, and counterfeit bank bill, purporting to be a bank bill payable to the bearer thereof, and to be signed in behalf of the president, directors, and company of the (Boston) bank, the same being a corporation by law licensed and authorized as a bank within this Commonwealth; which said false, forged, and counterfeit bank bill is of the following purport and effect, to wit, [*here set forth*

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[1] The words in the first section of the statute are "utter and publish," those used in the third section are "utter and tender in payment." There is no difference in the technical meaning of these words, yet the precise language of the statute must be used in both cases.

the forged bill as it is described in the indictment upon which the party was convicted,] and that he the said A. B. did then and there utter and tender in payment, as true, the aforesaid false, forged, and counterfeit bank bill, with intent one C. D.[1] to injure and defraud, he the said A. B. then and there well knowing the aforesaid bank bill to be false, forged, and counterfeit; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided; of which said offence the said A. B., at the Supreme Judicial Court begun and holden at B., within and for the county of on the Tuesday of in the year of our Lord one thousand eight hundred and was duly and legally convicted. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., afterwards, to wit, on at in the county aforesaid, had in his custody and possession a certain other false, forged, and counterfeit bank bill, purporting to be a bank bill payable to the bearer thereof, and to be signed in behalf of the president, directors, and company of the (Boston) bank, the same being a corporation by law licensed and authorized as a bank within this Commonwealth, which said last mentioned false, forged, and counterfeit bank bill is of the following purport and effect, to wit, [*here insert an exact copy of the forged bill in words and figures;*] and that he the said A. B. the aforesaid and last mentioned false, forged, and counterfeit bank bill, did then and there utter and tender in payment as true, with intent one E. F. to injure and defraud, he the said A. B. then and there well knowing the aforesaid and last mentioned bank bill to be false, forged, and counterfeit; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

160. *For bringing into, and being possessed of a Counterfeit Bill within this Commonwealth, with intent &c.: Drawn upon the Fourth Section of the Statute.*

The jurors &c., upon their oath present, that A. B., of &c., on at had in his custody and possession a certain false, forged, and counterfeit bill and note, in the similitude of the bills and notes payable to the bearer thereof, issued by and for the (Boston) bank, the same being a bank, and banking company legally established within this State;[2] which said false,

[1] The person alleged to be defrauded in the former conviction.

[2] If the forged bill be of a bank of another State, then say, "the same being a bank or banking company legally established within the state of naming the State.

forged, and counterfeit bill and note is of the following purport and effect, to wit, [*here insert the copy of the counterfeit bill or note in words and figures;*] and that he the said A. B. the aforesaid false, forged, and counterfeit bill and note in his hands and possession then and there had and kept, for the purpose of rendering the same current as true, and with intent to pass the same, he the said A. B. then and there well knowing the aforesaid bill and note to be false, forged, and counterfeit; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

Forms of Indictments upon the Fifth Section of the Statute.

161. *For making or mending any Tool &c., to be used in counterfeiting Bank Bills &c.*

The jurors &c., upon their oath present, that A. B., of &c. on at did engrave, form, and make, and did begin to engrave, form, and make, a certain tool, instrument, and material, called a plate, the same being a tool, instrument, and material devised, adapted, and designed for the stamping, forging, and making of false and counterfeit bills and notes, *in the similitude of the bills and notes*[1] payable to the bearers thereof, which have been, or which shall be issued as aforesaid, by and for the (Boston) bank; the same being a bank and banking company which is by law established in this State; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[2]

162. *For being possessed of any Tool &c., to be used in counterfeiting Bills &c.*

The jurors &c., upon their oath present, that A. B., of &c. on at had in his custody and possession a certain plate, engraven, devised, adapted, and designed for the stamping,

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[1] This phrase is not in the fifth section of the statute; but it is transcribed from the 4th section, and will be found to be necessary in the description of the offence in this section.

[2] The same form will be applicable to the other instruments mentioned in this section, such as paper, rolling presses, &c.

forging, and making of false and counterfeit bills and notes, payable to the bearer thereof, which have been issued by and for the (Boston) bank, the same being a bank and banking company which is by law established in this State, with the intent to use and employ the same, and to cause and permit the same to be used and employed in forging and making such false and counterfeit bills of the said (Boston) bank; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

FORMS &c. UPON THE SIXTH SECTION OF THE STATUTE.

163. *For counterfeiting any Gold or Silver Coin.*

The jurors &c., upon their oath present, that A. B., of &c., on at did forge and counterfeit, and did procure to be forged and counterfeited, and did willingly aid and assist in forging and counterfeiting a certain piece of silver coin, current within this Commonwealth by the laws and usages thereof, called a dollar; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

164. *Another Form for the Same, more fully set forth.*

The jurors &c., upon their oath present, that A. B., of &c., on at contriving and intending the citizens of this Commonwealth to deceive and defraud, twenty pieces of false and counterfeit coin, of copper, brass, and other mixed metals, of the likeness and similitude of the good and legal silver coin, current within this Commonwealth by the laws and usages thereof, called dollars, then and there falsely, deceitfully, and fraudulently did forge and counterfeit, and procure to be forged and counterfeited, and did willingly aid and assist in forging and counterfeiting; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

165. *For being possessed of ten Pieces of Counterfeit Coin, with intent to pass the same.*

The jurors &c., upon their oath present, that A. B., of &c., on at had in his custody and possession ten similar pieces of false and counterfeit coin, of the likeness and similitude

of the good and legal silver coin, current within this Commonwealth by the laws and usages thereof, called dollars; and that he the said A. B. the aforesaid ten similar pieces of false and counterfeit coin did willingly aid and assist in passing and rendering current, as true; and for that purpose, he the said A. B. the aforesaid ten pieces of false and counterfeit coin, forged and counterfeited to the similitude of the silver money and coin current as aforesaid, then and there, and at one and the same time, did have and possess, with intent to utter and pass the same, he the said A. B. then and there well knowing the same to be false, forged, and counterfeit; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

FORMS &c. UPON THE E VENTH SECTION OF THE STATUTE.

166. *For being possessed of any number of Pieces of false Coin, with intent &c.*

The jurors &c., upon their oath present, that A. B., of &c., on at had in his custody and possession five similar pieces of false money and coin, forged and counterfeited to the likeness and similitude of the silver money and coin current within this Commonwealth by the laws and usages thereof, called dollars; and that he the said A. B. the aforesaid five similar pieces of false and counterfeit coin, in his hands, custody, and possession, then and there had and kept, with intent to utter and pass the same as true; he the said A. B. then and there well knowing the same to be false, forged, and counterfeit; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

167. *For uttering and passing Counterfeit Coin, knowing &c.*

The jurors &c., upon their oath present, that A. B., of &c., on at had in his custody and possession a certain piece of false money and coin, forged and counterfeited to the likeness and similitude of the good and legal silver coin, current within this Commonwealth by the laws and usages thereof, called a dollar; and that he the said A. B. the aforesaid piece of forged and counterfeit coin did then and there utter, pass, and tender in payment, as true, with intent one C. D. then and there to injure and defraud; he the said A. B. then and there well

knowing the aforesaid piece of coin to be false, forged, and counterfeit; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

168. *For making or being possessed of any Tool &c., to be used in counterfeiting Coin: On the Eighth Section of the Statute.*

The jurors &c., upon their oath present, that A. B., of &c., on at intending the citizens of this Commonwealth to injure, deceive, and defraud, did cast, stamp, engrave, form, and make, and did then and there knowingly have and possess a certain tool and instrument, devised, adapted, and designed for the coining and making of false and counterfeit money and coin, in the similitude of the silver money and coin current within this Commonwealth by the laws and usages thereof, called a die; with the intent to use and employ the same, and to cause and permit the same to be used and employed in coining and making the false money and coin aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

169. *For forging a Bond signed with a Mark, with intent to defraud the Executors of a deceased Person.*[2]

The jurors &c., upon their oath present, that A. B., of &c., on at in the county aforesaid, did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited a certain bond purporting to be signed by one C. D. (then deceased) in his life time, with the mark [3] of him the said C. D., and to be by him sealed and delivered in his life time, which said bond is of the following purport and effect, to wit, [*here recite the bond with the mark of the said C. D.;*] with intent to defraud one E. F. and one G. H., executors of the last will and testament of the said C. D.; against the peace

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[1] Another count may be added for *possessing* only, in which the same form may be adopted, omitting the words "did cast, stamp, engrave, form, and make," and use the words "did then and there knowingly have and possess a certain tool," &c.

[2] Taken from Cro. C. C. 360, (6th Ed.); another count may be added for uttering and publishing. See a similar precedent, Stark. 522, (2d Ed.) There is no such precedent in the 1st edition.

[3] Forgery may be committed by making the mark of another person. Cro. C. C. 360, note (*a*), (6th Ed.)

of said Commonwealth, and contrary to the form of the statute in such case made and provided.

Precedents of Indictments for Forgery and Counterfeiting, drawn upon the Statutes of the United States.

170. *For forging a Bill or Note of the United States Bank.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at within the said district of did feloniously and falsely make, forge, and counterfeit, and did cause and procure to be feloniously and falsely made, forged, and counterfeited, and did willingly aid and assist in feloniously and falsely making, forging, and counterfeiting a certain bill *and*[2] note, in imitation of, and purporting to be a bill and note issued by order of the president, directors, and company of the bank of the United States; which said false, forged, and counterfeit bill and note is of the following purport and effect,[3] to wit, [*here insert a correct copy of the bill or note in words and figures ;*] with intention the said president, directors, and company of the said bank of the United States to injure and defraud ; against the peace of the said United States, and contrary to the form of the statute of said United States in such case made and provided.[4]

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[1] Act of April 10th, 1816, § 18; Gord. Dig. art. 3633, p. 711.

[2] The words of the statute are "bill *or* note." See the case of *Commonwealth* v. *Brown*, 7 Mass. R. 59. In that case the words of the statute of Massachusetts upon which the indictment was drawn are the same as in the statute of the United States above quoted, that is, "bills *or* notes." One of the errors assigned in that case was, that it did not appear by the indictment (which was in the words of the statute) whether the forged instruments were "bills" or "notes." This objection was overruled. *Per Curiam*, a bank bill is also a note.

[3] This mode of alleging the purport of the instrument is equally valid and more advisable than to allege it in the "tenor," in which case the slightest mistake is fatal.

[4] The words of the statute of the United States upon which this precedent is drawn are, "every such person shall be deemed and adjudged guilty of felony." The English precedents upon the statute of 15 Geo. 2, c. 13, or 45 Geo. 3, c. 89, for the forgery of a note of the bank of England, allege the forgery to have been feloniously committed. The offence by these statutes is capital. See the cases of *Commonwealth* v. *Macomber*, 3 Mass. R. 254, and *Commonwealth* v. *Newall et al.*, 7 Mass. R. 245.

171. *For uttering and publishing a forged Bill of the United States Bank, on the same Section of the Statute.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at had in his custody and possession a certain false, forged, and counterfeit bill and note, purporting to be a bill and note, issued by order of the president, directors, and company of the bank of the United States, which said false, forged, and counterfeit bill and note is of the following purport and effect, to wit, [*here insert a correct copy of the bill or note ;*] and that he the said A. B., the aforesaid false, forged, and counterfeit bill and note did then and there pass, utter, and publish as true, and attempt to pass, utter, and publish as true, knowing the same to be false, forged, and counterfeit, with intention the aforesaid president, directors, and company of the said bank of the United States to injure and defraud ; against the peace of the said United States, and contrary to the form of the statute of the said United States in such case made and provided.[2]

172. *For selling and delivering a forged Bill of the United States Bank : On the same Section of the Statute.*

The jurors &c., upon their oath present, that A. B., of &c., on at had in his custody and possession a certain false, forged, and counterfeit bill and note, in imitation of, and purporting to be a bill and note issued by order of the president, directors, and company of the said bank of the United States, which said false, forged, and counterfeit bill and note is of the purport and effect following, to wit, [*here insert a correct copy of the bill or note ;*] and that he the said A. B. the aforesaid false, forged, and counterfeit bill and note did then and there sell, utter, and deliver, and caused to be sold, uttered, and delivered, with intention the said president, directors, and company of the said bank of the United States to injure and defraud, he the said

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[1] An indictment for falsely making, forging, &c., can be supported by proof of a note originally genuine, but afterwards fraudulently altered. " If any part of a true instrument be altered, the indictment may lay it as a forgery of the whole." 2 East P. C. 978.

[2] The allegation as to the party defrauded must be according to the fact. The provisions of the statute in this respect are, " with intention to defraud the said corporation, [the United States bank,] or any other corporation or person." The party defrauded must, in all cases, be truly stated ; it is a material allegation in the indictment.

A. B. then and there well knowing the said bill and note to be false, forged, and counterfeit; against the peace of said United States. and contrary to the form of the statute of said United States in such case made and provided.

173. *For uttering and passing a falsely altered Bill, &c.: On the same Section of the Statute.*

The jurors &c., upon their oath present, that A. B., of &c., on at had in his custody and possession a certain falsely altered bill and note, which bill and note, before the same had been falsely altered, was issued by order of the president, directors, and company of the bank of the United States,[1] which said falsely altered bill and note is of the purport and effect following, to wit, [*here insert a correct copy of the said altered bill or note*,] and that he the said A. B. the aforesaid falsely altered bill and note did then and there pass, utter, and publish as true, and did then and there attempt to pass, utter, and publish as true, with intention the said president, directors, and company of the said bank of the United States to injure and defraud, he the said A. B. then and there well knowing the aforesaid bill and note to have been falsely altered as aforesaid; against the peace of said United States, and contrary to the form of the statute of the United States in such case made and provided.[2]

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[1] According to the *literal* construction of the words of the statute, the allegation would be, that the bank of the United States had issued "*a falsely altered bill or note;*" the allegation therefore, that it had been issued by the Bank *before it was altered*, may be material.

[2] The foregoing forms of indictments may be adopted in all the cases provided against in this section of the statute, which relate to the forging or passing of *orders* and *checks* on the bank or any cashier thereof.

Note. With respect to the forgery of *public documents*, made punishable by the several statutes of the United States, the same forms of precedents, *mutatis mutandis*, are to be adopted, as in cases of other forgeries, using the precise words of the statutes in the description of the instruments forged.

FORMS OF INDICTMENTS FOR COUNTERFEITING THE CURRENT COIN OF THE UNITED STATES.

174. *For counterfeiting any Gold or Silver Coin, resembling the Gold and Silver Coin which has been coined at the Mint of the United States.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, and did willingly aid and assist in falsely making, forging, and counterfeiting, a certain piece of gold coin, in the resemblance and similitude of the gold coin which has been coined at the mint of the United States, called an eagle, [*if a piece of foreign coin, say, in the resemblance and similitude of a piece of foreign gold coin, which by law has been made current in the said United States,*] with intent to defraud [*here allege the body politic or person intended to be defrauded;*] against the peace of the said United States, and contrary to the form of the statute of the said United States in such case made and provided.

175. *For uttering and publishing counterfeit Coin, which has been coined at the Mint of the United States.*[2]

The jurors &c., upon their oath present, that A. B., of &c., on at had in his custody and possession a certain false, forged, and counterfeit piece of gold coin, in the resemblance and similitude of the gold coin which has been coined at the mint of the United States, called an eagle, [*if a piece of foreign coin, say, in the resemblance and similitude of a piece of foreign gold coin, which by law has been made current in the United States,*] and that he the said A. B. the aforesaid piece of false, forged, and counterfeit gold coin did then and there pass, utter, and publish, [*or sell,*] and did then and there attempt to pass, utter, and publish, [*or sell or bring into the United States from a foreign place, with intent to pass, utter, publish, and sell as true, the aforesaid false, forged, and counterfeit coin,*] with intent one C. D. to injure and defraud, he the said A. B. then and there well knowing the said piece of gold coin to be false, forged, and counterfeit; against the peace of the said

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[1] Acts of 3d March, 1825, § 20, and of 21st April, 1806, § 1; Gordon's Digest, art. 3628, p. 710, 711. [2] Ibid.

United States, and contrary to the form of the statute of the said United States in such case made and provided.[1]

176. *For debasing the Coin of the United States, by an Officer employed at the Mint.*[2]

The jurors &c., upon their oath present, that A. B., of on at he being then and there a person and officer employed at the mint of the United States, on the said day of at aforesaid, did debase and make worse certain pieces, to wit, ten pieces of gold coin, called eagles, (which had been struck and coined at the said mint of the United States,) as to the proportion of fine gold therein contained, and which were then and there by the said A. B., he being such person and officer employed in the said mint of the said United States as aforesaid, made of less weight and value than the same ought to be by the provisions of the several acts and laws of the said United States relative thereto, through the default and connivance of the said A. B., he being then and there such person and officer employed as aforesaid in the said mint, for the purpose of unlawful profit and gain, and with an unlawful and fraudulent intent, to debase, make worse, and render of no value the aforesaid ten pieces of gold coin; against the peace of said United States, and contrary to the form of the statute of said United States in such case made and provided.

177. *For fraudulently diminishing the Coin of the United States.*[3]

The jurors &c., upon their oath present, that A. B., of on at did unlawfully, fraudulently, and for gain's sake, impair, diminish, falsify, scale, and lighten certain pieces, to wit, ten pieces of gold coin, called eagles, which had been coined at the mint of the United States, with intent to defraud some person, to the said jurors unknown; against the peace of said United States, and contrary to the form of the statute of said United States in such case made and provided.[4]

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[1] Section 21 of the same statute, against the forgery and counterfeiting of *copper coin*, is in the same words as section 20, using the words "copper coin," instead of "gold and silver coin."

[2] Act of 3d March, 1825, § 21; Gordon's Digest, art. 3630, p. 711.

[3] Act of 21st April, 1806, § 3; Gordon's Digest, art. 3631, p. 711.

[4] If the coin debased was foreign gold or silver, then say, "which said gold coin were ten pieces of foreign gold coin, which were by the laws of the United States made current, and were in actual use and circulation, as money, within the said United States."

GAMING AND GAMING-HOUSES.

178. *For playing at Cards at a House of Entertainment.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at being a person of idle and dissolute habits of life, did play with cards, at a certain unlawful game, called all-fours, with one C. D., in a certain tavern and house of entertainment there situate, kept by one E. F., the same being a place licensed for retailing spirituous liquors, and the said cards, with which said unlawful game was played, being implements used in gaming; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

179. *For exposing to View Implements of Gaming.*[2]

The jurors &c., upon their oath present, that A. B., of &c., being a person of idle and dissolute habits of life, on at did expose to view certain cards, [*dice, or billiards, as the case may be,*] the same being implements used in gaming, in a certain tavern and house of entertainment there situate, the said tavern and house of entertainment being a place licensed for retailing spirituous liquors, kept by one C. D.; and that he the said A. B. was seen sitting at a certain table in the said tavern and house of entertainment with the said implements before him; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

180. *For winning Money by Gaming: On the third Section of the Statute of Massachusetts of* 1785, *c.* 58.

The jurors &c., upon their oath present, that A. B., of &c., being a person of idle and dissolute habits of life, on at did play with cards, at a certain unlawful game, called all-fours, with one C. D., in a certain tavern and house of entertainment there situate and kept by one E. F., (the same being a place licensed for retailing spirituous liquors;) and that he the said A. B., by playing at the said unlawful game with the said C. D., did then and there unlawfully win of the said C. D., at one time and sitting, and by gaming and betting as aforesaid, more than the sum of three dollars and thirty-three cents in money, to wit, the sum of ten dollars, at the said unlawful game of all-

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[1] On the fifth section of the statute of Massachusetts of 1785, c. 58.

[2] On the same section and statute.

fours, in manner and form aforesaid, the said cards, with which said unlawful game was played, being implements used in gaming; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

181. *For keeping a common Gaming-House for Billiards: On the Statute of* 1798, *c.* 1, § 1.

The jurors &c., upon their oath present, that A. B., of &c., being a person of idle and dissolute habits of life, on and on divers other days and times between that day and the day of the finding of this bill, at in the county aforesaid, did unlawfully keep, and suffer to be kept, a table for the purpose of playing at a certain unlawful game, called billiards,[1] in a certain house there situate, belonging to him the said A. B., and by him occupied, for the purpose of lucre and gain, he the said A. B, being then and there, and during all the time aforesaid, an innholder, tavern-keeper, and licensed as a retailer of spirituous liquors in the said town of B., and that he the said A. B., on the said days and times there, did wittingly and willingly suffer and allow divers idle and ill-disposed persons, whose names are to the jurors aforesaid as yet unknown, to play therein at the said unlawful game of billiards, and on the days and times aforesaid, at B. aforesaid, did unlawfully, wittingly, and willingly suffer and allow the said idle and evil-disposed persons to be and remain therein, playing and gaming at the said unlawful game of billiards, for divers large and excessive sums of money; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

182. *For keeping a private Billiard Table for hire, &c.: On the second Section of the Statute of* 1798, *c.* 20.

The jurors &c., upon their oath present, that A. B., of &c., being a person of idle and dissolute habits and manners, on and on divers other days and times between that day and the day of the finding of this bill, at in the county aforesaid, (the said A. B. being then and there a person not licensed as an innholder, tavern-keeper, victualler, or retailer of spirituous liquors,) did keep and suffer to be kept, in a certain house and building there situate, and by him actually occupied and improved, a certain table for the purpose of playing at an unlawful game called billiards, for hire, gain, and reward, and did then and there, and

[1] Or cards or dice, as the case may be.

on the days and times aforesaid, there allow and suffer divers idle and evil disposed persons, whose names are to the jurors aforesaid as yet unknown, for hire, gain, and reward, to resort to the same table, for the purpose of playing at the said unlawful game called billiards; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

183. *For playing at Billiards: On the third Section of the Statute of* 1798, *c.* 20.

The jurors &c., upon their oath present, that A. B., of &c., being an idle and dissolute person, on   and on divers other days and times between that day and the day of the finding of this bill, at   in the county aforesaid, did play at a certain unlawful game, called billiards, at a table kept and made use of for that purpose by one C. D., in a certain house and building there situate, by him the said C. D. actually occupied and improved; he the said C. D. being then and there a person not licensed as an innholder, tavern-keeper, victualler, or retailer of spirituous liquors, which said table was then and there kept and maintained by the said C. D. in the house and building aforesaid, for the purpose of playing at the said unlawful game, called billiards, and for hire, gain, and reward; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

LARCENY AND ROBBERY.

184. *For simple Larceny, at Common Law, for stealing the Property of several Persons.*[2]

The jurors &c., upon their oath present, that A. B., late of &c., laborer, on   at   aforesaid, in the county afore-

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[1] For keeping a common gaming-house, see 2 Chitt. 676, 677. For keeping a common E. O. Table, 2 Chitt. 675.

[2] 3 Chitt, 960; Stark. 426; Cro. C. C. 406, (6th Ed.) When the goods of several persons are taken at the same time, the indictment may include the whole; but not so if taken at different times; Stark. 427, note *(e)*; 3 Chitt. 960, note *(a.)* The value of each article, and the name of each owner, must be separately and specially alleged. When the article stolen is money, it must be alleged to be "of the moneys" of the said [*the owner*,] instead of the goods and chattels.

said, one silver spoon of the value of two dollars, of the goods and chattels of one C. D., and two candlesticks of the value of one dollar, of the goods and chattels of E. F., then and there in the possession of C. D. and E. F. being found, feloniously did steal, take, and carry away; against the peace and dignity of the Commonwealth aforesaid.

185. *For simple Larceny: On the 1st Section of the Statute of Massachusetts, of* 1804, *ch.* 143.

The jurors &c., upon their oath present, that A. B., of &c., on at in the county aforesaid, one silver spoon of the value of five dollars, of the goods and chattels of one C. D., then and there in the possession of said C. D. being found, feloniously did steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

186. *For breaking and entering a Shop in the Night, and committing a Larceny therein: On the fourth Section of the Statute.*[1]

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, the shop of one A. B. there situate, in the night time did break and enter, and sundry bank bills, amounting together to the sum of one hundred dollars, and of the value of one hundred dollars, and [*here insert all the articles stolen, alleging the kind, number, and value of each,*] of the goods and chattels of the said A. B., then and there in the shop aforesaid being found, feloniously did steal, take, and carry away in the shop aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[2]

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[1] In indictments for stealing any of the articles mentioned in this section of the statute, the description of the article must follow the precise words of the statute; as "a promissory note given for the sum of $," "a certain deed and writing, containing a conveyance of lands," &c. If the article stolen be money, say, "sundry pieces of silver coin, current within this Commonwealth, amounting together to the sum of five dollars, of the moneys of him the said A. B."

[2] The same form is to be adopted for a larceny in a ware-house, or office, not adjoining to, or occupied with a dwelling-house.

187. *For breaking and entering a Vessel in the Night Time and committing a Larceny therein: On the fourth Section of the Statute.*

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, a certain vessel of one A. B.,[1] called the Sally of Boston, within the body of the said county of S., then and there lying and being, in the night time, did break and enter, and one trunk of the value of five dollars, and [*here state the kind and value of each article*,] of the goods and chattels of one E. F., in the trunk aforesaid then and there contained, and in the vessel aforesaid then and there being found, feloniously did steal, take, and carry away in the vessel aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

188. *For entering a Dwelling-House in the Night Time, without breaking, the Owner being therein, and put in Fear: On the fifth Section of the Statute.*[2]

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, the dwelling-house of one A. B., there situate, in the night time did enter, without breaking the same, he the said A. B., his wife, and divers others of his family, in the dwelling-house aforesaid then and there being, and in bodily fear and danger of his and their lives, by him the said C. D. being then and there feloniously put; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

189. *For breaking and entering a Dwelling-House in the Day Time, the Owner being therein, and put in Fear: On the fifth Section of the Statute.*

The jurors &c., upon their oath present, that C. D., of in the county aforesaid, laborer, on the day of

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[1] It is said not to be necessary to insert the name of the owner of the vessel. If he is known, there is the same reason for it as for inserting the name of the owner of a house. If the owners' name or names are not known, it should be stated, "that the names of the owners are to the jurors unknown."

[2] Stark. 444. It is essential to aver that the person in thé dwelling-house was put in fear of his life by the defendant. See also Leach, 771; East, P. C. 635.

now last past, at B. aforesaid, in the county aforesaid, the dwelling-house of one A. B., there situate, in the day time did break and enter, he the said A. B., his wife, and divers others of his family, in the dwelling-house aforesaid then and there being, and in bodily fear and danger of his and their lives, by the said C. D., being then and there feloniously put; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

190. *For breaking and entering an Out-House, adjoining a Dwelling-House &c., in the Day Time, the Owner being therein, and put in fear: On the fifth Section of the Statute.*[1]

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, a certain out-house, called a wood-house, adjoining to, and occupied with the dwelling-house of one A. B., there situate, in the day time did break and enter, he the said A. B., his wife, and divers others of his family in the said dwelling-house then and there being, and in bodily fear and danger of his and their lives, by the said C. D., being then and there feloniously put; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

191. *For committing a Larceny in the Day Time, in a Dwelling-House: On the sixth Section of the Statute.*

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, two sheets of the value of six dollars, one surtout-coat of the value of ten dollars, and one hat of the value of five dollars, of the goods and chattels of one A. B., then and there in the dwelling-house of him the said A. B.[2] being found, feloniously did steal, take, and carry away in the dwelling-house aforesaid; against the peace of said Com-

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[1] Similar forms are to be adopted for breaking and entering in the day time the other buildings, ships, or vessels, mentioned in this section, following the description of the buildings or vessels as in the statute.

[2] If the goods stolen belong to one person, and the dwelling-house in which they are stolen belongs to another person, it must be so alleged in the indictment. The same form as the last is to be adopted for larcenies in the other buildings, ships, or vessels, mentioned in this section, the allegation in the indictment being made conformable to the fact.

monwealth, and contrary to the form of the statute in such case made and provided.

192. *For breaking and entering a Meeting-House in the Night Time, and committing a Larceny therein: On the sixth Section of the Statute.*[1]

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the   day of   now last past, at B. aforesaid, in the county aforesaid, the meeting-house of the first parish in said B., there situate, and erected for public uses, to wit, for the public worship of God, in the night time did break and enter, and two silver cups, of the value of fifty dollars, of the goods and chattels of the members of the first church of Christ[2] in the said town of B., whose names are to the jurors aforesaid unknown, then and there in the meeting-house aforesaid being found, feloniously did steal, take, and carry away in the meeting-house aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

193. *For breaking and entering a Court-House in the Night Time, and committing a Lareeny therein: On the sixth Section of the Statute.*[3]

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the   day of   now last past, at B. aforesaid, in the county aforesaid, the court-house of the said county of S., there situate, and erected for public uses, to wit, for holding the judicial courts in the said county of S.; in the night time did break and enter, and [*here insert the articles stolen, and allege the value of each,*] of the goods and chattels of the said county of S., then and there in the court-house aforesaid being found, feloniously did steal, take, and carry away in the court-

[1] If the property stolen belongs to an episcopal church, it must be alleged to be "in the parishioners of the said parish, in the custody of E. F. and G. H., then church wardens of said parish." For this see 3 Chitt. 992; Stark. 448.

[2] If the property stolen belongs to the parish or to an individual, and not to the church, it must be so alleged in the complaint. See 3 Chitt. 992; Stark. 448.

[3] If the larceny be committed in a town-house, it must be alleged to be the property of the town in which it is situated, by its corporate name. If in a college or academy, the property must be alleged to be in the college or academy, by its corporate name, and they must be alleged to be buildings erected for public uses.

house aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

194. *For breaking and entering a Stable in the Night Time, and committing a Larceny therein: On the sixth Section of the Statute.*

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, the stable of one A. B., there situate, in the night time did break and enter, and one gelding of the value of one hundred dollars, one saddle of the value of ten dollars, and one bridle of the value of five dollars, of the goods and chattels of the said A. B., then and there in the stable aforesaid being found, feloniously did steal, take, and carry away in the stable aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

195. *For stealing from the Person, openly and violently: On the eighth Section of the Statute.*[2]

The jurors &c., upon their oath present, that C. D. of in the county aforesaid, laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, one silver watch with a steel chain, of the value of twenty dollars, of the goods and chattels of one A. B., then and there, openly and violently, from the person of him the said A. B., feloniously did steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

196. *For stealing from the Person privily and fraudulently: On the eighth Section of the Statute.*[3]

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, sundry bank bills, amounting together to the sum of thirty dollars, and of the value of thirty dollars, and

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[1] The same form is to be used, when the larceny is committed in any of the other private buildings, mentioned in this section of the statute, always describing the buildings in the very words of the statute.

[2] 2 Stark. 448; 3 Chitt. 992; Cro. C. A. 178; Cro. C. C. 443, (6th Ed.)

[3] Cro. C. C. 412, (6th Ed.)

sundry pieces of silver coin, current by law and usage within this Commonwealth, amounting together to the sum of five dollars, and of the value of five dollars, of the goods, chattels, and moneys of one A. B., then and there, privily and fraudulently, from the person of him the said A. B., feloniously did steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

197. *For a second Conviction of Larceny: On the third Section of the Statute.*

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, one mare of the value of fifty dollars, one saddle of the value of five dollars, and one bridle of the value of two dollars, of the goods and chattels of one A. B., then and there in the possession of the said A. B. being found, feloniously did steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, at the Supreme Judicial Court, begun and holden at in and for the county of on the Tuesday of in the year of our Lord one thousand eight hundred and the said C. D. was duly and legally convicted, for that he the said C. D. on with force and arms, at B. aforesaid, in the county aforesaid, seventeen yards of linen cloth, of the value of five dollars, of the goods and chattels of one E. F., in his possession then and there being found, feloniously did steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

Precedents for Larceny, on the Statutes of the United States.

198. *Against an Officer of the Bank of the United States, for a Larceny of the Property of the Bank: On the Statute of 3d March,* 1816, § 18.

The jurors &c., upon their oath present, that A. B., of &c., on at he the said A. B. being then and there a

person employed as cashier [*president, clerk, or servant, as the case may be,*] in the bank of the United States, created and established by an act, entitled "An act to incorporate the subscribers to the bank of the United States," passed on the tenth day of April, in the year of our Lord one thousand eight hundred and sixteen,[1] one thousand dollars of the money, goods, and chattels, belonging to the said bank of the said United States,[2] of the value of one thousand dollars, then and there in the possession of the said bank of the said United States being found, feloniously did steal, take, and carry away; against the peace of said United States, and contrary to the form of the statute of said United States in such case made and provided.

199. *Against an Officer of the Bank of the United States for embezzling Money, Goods, &c.: On the latter Clause of the same Section of the Act.*

The jurors &c., upon their oath present, that A. B., of &c., on at he the said A. B. being a person then and there employed as cashier [*if employed as any other officer it must be so stated,*] in the Bank of the United States, created and established by an act, entitled "An act to incorporate the subscribers to the Bank of the United States," passed &c. [*as in the preceding precedent; see also note* (1) *to the preceding precedent,*] one thousand dollars of the money, goods, and chattels, belonging to the said Bank of the said United States, [*see note* (2) *to the preceding precedent,*] of the value of one thousand dollars, in the possession of the said Bank of the said United States being found, did then and there fraudulently embezzle, secrete, and make away with, which said sum of one thousand dollars he the said A. B. had received, and which came to his possession

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[1] If the officer charged be an officer in *any office of discount*, then the allegation must be "he the said A. B. being then and there a person employed as cashier [*or other officer, as the case may be,*] in a certain office of discount and deposit, established by the directors of the bank of the United States, in the town of within the state of

The same form may be adopted for a larceny of any other article or species of property mentioned in the statute, as a bond, bill, bank note, &c. giving a general description of it.—See act of 3d March, 1825, § 18; Gordon's Digest, art. 3697, p. 725.

[2] If the property or article stolen did not belong to the bank, but was deposited, then allege as follows; "of the money, goods, and chattels of one C. D., then and there deposited in said bank of the United States by said C. D., of the value," &c.

and custody by virtue of his said employment as such cashier as aforesaid; against the peace of said United States, and contrary to the form of the statute of said United States in such case made and provided.

200. *For Larceny and Embezzlement of public Property: On the Statute of the United States of 30th April*, 1790, § 26.[1]

The jurors &c., on their oath present, that A. B., of &c., on at being a person having the charge and custody of certain arms and other ordnance and munitions of war belonging to the United States, certain arms, to wit, ten muskets,[2] of the value of one hundred dollars, of the property, goods, and chattels of the said United States, in the charge and custody of the said A. B. then and there being, wittingly, advisedly, and of purpose to hinder and impede the service of the said United States, and for lucre and gain, did embezzle, steal,[3] purloin, and convey away; against the peace of said United States, and contrary to the form of the statute of said United States in such case made and provided.

201. *Against an Assistant Postmaster, for stealing Money which came into his Hands as Assistant Postmaster: On the Act of 3d March*, 1825, § 21.[4] *See Gordon's Digest, Art.* 3611, *p.* 704.

The jurors &c., upon their oath present, that A. M., of &c., Esquire, on at he the said A. M. being then and there a person employed in one of the departments of the post-office establishment of the United States of America, to wit, as an assistant of the deputy postmaster of the post-office, legally established and appointed by the postmaster-general of the United States, within the said town of Granby, feloniously did steal, take, and carry away sundry bank notes, amounting together to the sum of two hundred and seventy dollars, and of the value of two hundred and seventy dollars, of the goods, chattels,

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[1] Gordon's Digest, art. 3641, p. 714.

[2] The same form is to be adopted, as to all the other articles and property enumerated in the statute.

[3] This section of the statute is drawn in a very incorrect manner. The word *purloin* is used in the former part of it, and the word *stolen* in the latter part, for the same purpose.

[4] This indictment was drawn by Professor Ashmun of the law school in Cambridge. The case was twice tried without obtaining a verdict.

and property of one N. P. and one A. M.; which said bank notes were then and there feloniously taken and stolen as aforesaid by the said A. M. out of a certain letter, which came to the hands and possession of him the said A. M., in his said capacity and employment as such assistant post-master as aforesaid; against the peace of said United States, and contrary to the form of the statute of said United States in such case made and provided.

202. *Form of Indictment for Robbery: On the Statute of Massachusetts of* 1804, *c.* 143.[1]

The jurors &c., upon their oath present, that A. B., of &c., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one C. D., of in the county aforesaid, feloniously did make an assault, and him the said C. D. *(in bodily fear and danger of his life then and there feloniously did put,[2])* and one gold watch, of the value of one hundred dollars, of the goods and chattels of him the said C. D., from the person and against the will of him the said C. D., then and there feloniously, and by force and violence, did steal, rob, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

203. *For a capital Robbery, the Prisoner being armed with a dangerous Weapon, with Intent to kill or maim: On the first Section of the Statute of Massachusetts of* 1818, *c.* 124.

The jurors &c., upon their oath present, that M. M., lately resident in Medford, in the county of Middlesex, laborer, on the day of now last past, with force and arms, at Medford aforesaid, in the county aforesaid, in and upon one J. B. feloniously did make an assault, and him the said J. B. *(in bodily fear and danger of his life then and there feloniously did put,[3])* and one gold watch, with a gold chain and seal, of the value of one hundred and fifty dollars, of the goods and chattels of him the said J. B., from the person and against the will of

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[1] 2 Stark. 449, notes (*k*) and (*l*). It is not necessary to allege the robbery to have been committed in the highway.

[2] *Commonwealth* vs. *Humphries*, 7 Mass. R. 242; where it is decided, that the allegation of *force* and *violence* is sufficient, without alleging that the party robbed *was put in fear*. See other precedents in 3 Chitt. 806; Cro. C. C. 634, (6th Ed.); 2 Stark. 449, note (*m*), to the same point; in which it is said, that the phrase, "'putting him in fear,' is of modern introduction."

[3] Not necessary.

him the said J. B., then and there feloniously, and by force and violence, did steal, rob, take, and carry away, he the said M. M. being then and there, at the time of committing the assault and robbery aforesaid, armed with a dangerous weapon, to wit, with a pistol, with intent him the said J. B. to kill and maim; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

204. *For a capital Robbery, the Prisoner being armed with a dangerous Weapon, and actually striking and wounding the Person assaulted and robbed: On the latter Clause of the first Section of the Statute of* 1818, *c.* 124.

The jurors &c., upon their oath present, that S. C. and G. C., both lately residents in B. aforesaid, laborers, on the   day of   now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one Ezra Haynes feloniously did make an assault, and sundry pieces of silver coin, current within this Commonwealth by the laws and usages thereof, amounting together to the sum of twelve dollars, and of the value of twelve dollars, of the moneys and property of him the said Ezra Haynes, from the person and against the will of him the said Ezra Haynes, then and there feloniously, and by force and violence, did rob, steal, take, and carry away, and that they the said S. C. and G. C., at the time of committing the assault and robbery aforesaid, were then and there armed with a certain dangerous weapon, made of iron, called a heading-tool; and being then and there so as aforesaid armed, they the said S. C. and G. C. with the dangerous weapon aforesaid, him the said Ezra Haynes, in and upon the face and head of him the said Ezra, then and there feloniously did actually strike and wound; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[3]

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[1] This was the indictment in the case of the *Commonwealth* vs. *Michael Martin*, upon which the prisoner was convicted at the Supreme Judicial Court in Middlesex, October Term, A. D. 1821, and afterwards executed. There is a learned exposition of the statute, in that case, by the late Chief Justice Parker, upon the questions of law submitted by the prisoner's counsel, 17 Mass. R. 359. This was the first case that was tried after the statute was passed.

It is not alleged that the pistol was loaded. It might have been difficult, if not impossible, in this particular case, to have proved that fact, and the court were of opinion, that a pistol might be a dangerous weapon, whether loaded or not.

[3] This was the indictment in the case of the *Commonwealth* vs. *Clisby & Close*, upon which they were convicted at the Supreme Judicial Court, November Term, in Suffolk, A. D. 1821, and afterwards executed.

205. *For robbing a Carrier of the Mail of the United States by the use of a dangerous Weapon: On the Act of Congress of 3d March* 1825, § 22.[1]

The jurors &c., upon their oath present, that A. B., of on at in and upon one C. D., who was then and there a carrier of the mail of the United States and then and there intrusted with the said mail, feloniously did make an assault; and him the said C. D. being then and there such carrier of the said mail as aforesaid, [*in bodily fear and danger of his life did then and there feloniously put*,][2] and the said mail of the said United States, containing divers valuable letters, and articles of property of great value, the amount, value, and nature of which are to the jurors aforesaid yet unknown, from the person of him the said C. D., being then and there such mail carrier as aforesaid, and entrusted with the said mail as aforesaid, then and there feloniously and by force and violence did rob, steal, take, and carry away; and that he the said A. B., at the time of committing the assault and robbery aforesaid, was then and there armed with a certain dangerous weapon, called a pistol; and in effecting the robbery of the said mail as aforesaid did feloniously wound the person of him the said C. D. with the pistol aforesaid, he the said C. D. then and there having the custody of the said mail as aforesaid; and did then and there feloniously put the life of him the said C. D., then and there having the custody of the said mail as aforesaid, in jeopardy, by the use of the said dangerous weapon called a pistol; against the peace of the said United States, and contrary to the form of the statute thereof in such case made and provided.

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[1] If a dangerous weapon was not used, that part of this precedent in which it is alleged, is to be omitted, and the precedent will then be correct for a robbery not capital.

[2] Not necessary.

LEWDNESS AND LASCIVIOUS COHABITATION.

206. *For Lewd and Lascivious Cohabitation.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at and from that day to the day of in the year of did lewdly and lasciviously associate and cohabit with one C. D., of single woman, he the said A. B., during all the time aforesaid, being a married man and having a lawful wife alive; against the peace of said Commonwealth, and contrary to the form of the statute &c.

207. *For open, gross Lewdness, and Lascivious Behaviour.*[2]

The jurors &c., upon their oath present, that A. B., of &c., on at was guilty of open, gross lewdness and lascivious behaviour, by openly, grossly, lewdly, and lasciviously lying on a bed with one C. D., of single woman, in a grossly lewd, lascivious, and indecent posture, with his nakedness exposed, for the space of one hour; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

208. *At common Law, for exposing Defendant's naked Body in a public Street.*

The jurors &c., upon their oath present, that A. B., of &c., devising and intending the morals of the people of this Commonwealth to debauch and corrupt, on at in the county aforesaid, on a certain common and public highway there situate, in presence of divers citizens of said Commonwealth then and there being, and within sight and view of the said citizens, through and in the said highway then and there passing and repassing, unlawfully, scandalously, and wantonly did expose to the view of the said persons present, and so passing and repassing as aforesaid, the body and person of him the said A. B., naked and uncovered, for the space of one hour, to the manifest

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[1] Statute of Massachusetts 1784, ch. 40. This is an offence at common law. 4 Bl. Com. 64; Hawk. b. 1, c. 5, § 4. The cohabitation must be a dwelling and living together, not a transient interview. *Commonwealth* v. *Califfe*, 10 Mass. R. 158.

[2] The act must be open, gross, &c. not secret or private. For this see *Commonwealth* v. *Catlin*, 1 Mass. R. 8.

corruption of public morals and manners, and against the peace and dignity of the Commonwealth aforesaid.[1]

LIBEL.

209. *For publishing a libellous Letter, imputing the Crime of Theft to the Prosecutor.*[2]

The jurors &c., upon their oath present, that A. B., of &c., designing and maliciously intending to injure, vilify, and defame the character and credit of one C. D., and to bring him into disgrace and infamy, on at in the county aforesaid, a certain false, scandalous, and libellous writing against him the said C. D., and of and concerning him the said C. D., falsely and maliciously did frame and make; and in the name of him the said A. B. did then and there write and publish, and cause to be written and published, in the form of a letter, directed to him the said C. D., the purport and effect of which said writing is as follows: "To C. D., &c., [*here insert the letter correctly, with proper innuendoes;*] and that the said A. B., with intention to injure, abuse, and defame the said C. D., and to bring him into contempt, disgrace, and infamy, the said false, libellous, and malicious writing, so as aforesaid framed, written, and made, afterwards, to wit, on the said day of in the year aforesaid, at aforesaid, in the county aforesaid, to one E. F., and to divers other good citizens of the said Commonwealth then and there present, did maliciously and openly deliver and publish, and cause to be openly delivered and published, to the great damage, infamy, and scandal of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

210. *For a Libel upon a private Individual.*[3]

The jurors &c., upon their oath present, that A. B., of in the county of yeoman, unlawfully and maliciously contriving and intending to vilify and defame one C. D., and to

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1 See 10 Stat. Tri., Ass. 93; 1 Sid. 168; 1 Keb. § 620; 1 Sess. Ca. 231; and Archib. 376.

2 See a similar precedent 3 Chitt. 889; and Cro. C. C. 421, (6th Ed.)

3 3 Chitt. 888.

bring him into public scandal and disgrace, and to injure and aggrieve him the said C. D., on at in the county aforesaid, unlawfully and maliciously did compose and publish, and cause to be composed and published, a certain false, scandalous, malicious, and defamatory libel, of and concerning him the said C. D., containing therein, among other things, the false, malicious, defamatory, and libellous words and matter following, that is to say,[1] [*here insert and state the libellous matter with proper inuendoes, and then proceed as follows;*] which said false, scandalous, malicious, and defamatory libel, he the said A. B., afterwards, to wit, on the day of in the year aforesaid, at in the county aforesaid, unlawfully and maliciously did send and cause to be sent to one E. F., in the form of a letter, addressed to the said E. F., and did thereby, then and there, unlawfully and maliciously publish and cause to be published the aforesaid libel, to the great damage of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

211. *For a Libel upon an Attorney, contained in a Letter.*[2]

The jurors &c., upon their oath present, that on the day of at in the county aforesaid, one A. B. was one of the attornies of the Supreme Judicial Court of this Commonwealth, and had been, and was, before the composing, writing, and publishing of the several false, malicious, and defamatory libels hereinafter mentioned, retained and employed by one C. D., in the business and employment of his the said A. B.'s profession of an attorney at law, to write a letter to one E. F., demanding payment of a certain sum of money, to wit, the sum of fifty dollars, then due and owing from the said E. F. to the said C. D., and that the said E. F., of in the county aforesaid, yeoman, unlawfully and maliciously contriving and intending to injure, scandalise, vilify, and defame the said A. B., and to bring him into public scandal and disgrace, and to injure,

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[1] Great judgment should be used in selecting the libellous part, where the whole is not to be inserted, and when it is unnecessary or improper to insert the whole publication. It is most judicious to insert the whole in all cases when the subject of the whole is the same, although one part of it may be more libellous than another, and would, of itself, be sufficient to support the indictment.

[2] See a similar precedent, 3 Chitt. 894, and a note there, in which it is said, that "this indictment was settled by a very eminent pleader now at the bar."

prejudice, and ruin him in his said business and profession of an attorney at law, on at aforesaid, unlawfully and maliciously did compose and write a certain false, scandalous, malicious, and defamatory libel, of and concerning the said A. B. in his said business and profession, and of and concerning the demand aforesaid, so as aforesaid made by the said A. B. on the said E. F. as aforesaid; containing therein, among other things, the false, malicious, defamatory, and libellous words and matter following, of and concerning the said A. B., that is to say, [*here insert the libellous matter with proper inuendoes;*] which said false, malicious, and defamatory libel, he the said E. F., afterwards, to wit, on the day of in the year aforesaid, at aforesaid, unlawfully and maliciously did send and cause to be sent to the said C. D., in the form of a letter addressed to the said C. D., and thereby then and there, unlawfully and maliciously did publish and cause to be published the aforesaid libel; against the peace and dignity of the Commonwealth aforesaid.

212. *Against the Printer of a Newspaper, for publishing an Advertisement by a married Woman, offering to become a Mistress.*[1]

The jurors &c., upon their oath present, that A. B., late of in the county aforesaid, printer, being a person of an immoral and depraved mind and disposition, and unlawfully contriving and intending to bring the state of matrimony into public contempt and discredit; to corrupt the morals of the people of this Commonwealth, and to induce the citizens thereof to commit the crimes of fornication and adultery, on at did unlawfully and wickedly print and publish, and cause and procure to be printed and published, in a certain public newspaper, called the [*here insert the title of the newspaper,*] a certain immoral and mischievous libel in the form of an advertisement; which said immoral and mischievous libel is of the purport and effect following, to wit, [*here insert the advertisement verbatim, with proper inuendoes;*] to the great scandal and reproach of religion, good morals, and good manners, to the evil and pernicious example of all others in like case to offend, and against the peace and dignity of the Commonwealth aforesaid.

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[1] 3 Chitt. 887.

213. *For a Libel, by hanging Prosecutor in Effigy.*[1]

The jurors &c., upon their oath present, that A. B., of in the county of yeoman, being a person of a revengeful and malicious mind and disposition, and unlawfully and maliciously devising and intending to injure and vilify the good name and reputation of one C. D., and to bring him into contempt, ridicule, and disgrace, on at did unlawfully and maliciously make, and cause to be made, a certain gallows, and also a certain effigy and figure, intending to represent the person of the said C. D., and afterwards, to wit, on the same day and year aforesaid, at aforesaid, in the county aforesaid, unlawfully and maliciously did erect and set up, and caused and procured to be erected and set up, the said gallows, in and upon a certain piece of ground near the public post-road and common highway there; and kept and continued, and caused to be kept and continued the said gallows, so there erected and set up as aforesaid, for the space of eight days then next following; and during all that time, at aforesaid, in the county aforesaid, the said A. B. unlawfully and maliciously hung up and suspended, and kept hung up and suspended, and caused and procured to be hung up and suspended, and to be kept hung up and suspended, the said effigy and figure so intended to represent the said C. D., to, and upon the said gallows, and kept and continued, and caused and procured to be kept and continued, the said effigy and figure, intending to represent the said C. D as aforesaid, so hung up and suspended for the space of eight days; and during the said eight days respectively, then and there, unlawfully and maliciously published and exposed the said gallows, with the said effigy and figure, so intended to represent the said C. D. as aforesaid, thereto suspended, to the sight and view of all the citizens of said Commonwealth, passing and repassing in the public road and common highway as aforesaid; to the great damage, injury, and disgrace of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

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[1] See a similar precedent in 3 Chitt. 908, 909, which refers to a similar precedent in Hand. Prac. 225.

214. *For publishing an ex parte Statement of an Examination before a Magistrate, for an Offence with which the Defendant was charged.*[1]

The jurors &c., upon their oath present, that before the printing and publishing of the defamatory and malicious libel herein afterwards mentioned, to wit, on &c., one A. B. preferred to and before C. D., Esquire, then and still one of the justices of the peace within and for the county of duly and legally authorized, appointed, and qualified to discharge and perform the duties of said office, a certain complaint and charge, in due form of law, against one E. F., for that he the said E. F., on at with force and arms, in and upon the body of her the said A. B did make an assault, with intent her the said A. B. to ravish and carnally know, by force, and against her will; against the peace &c., and the form of the statute &c.[2] And the jurors aforesaid, upon their oath aforesaid, do further present, that G. H., of &c., printer, well knowing the premises, but devising and intending to traduce and defame the said E. F., and to injure and prejudice him in the minds of the good people of said Commonwealth, and to cause it to be believed, that he was guilty of the said felonious assault, and thereby to prevent the due administration of justice, and to deprive the said E. F. of the benefit of an impartial trial for and concerning the matter of the said charge, on at &c., did wilfully and maliciously print and publish, and did cause and procure to be printed and published, a certain scandalous, malicious, and defamatory libel, of and concerning the said charge and the matter thereof, and of and concerning the said E. F.; which said scandalous and malicious libel is of the following purport and effect, that is to say, [*here insert the publication correctly and with proper inuendoes;*] to the great damage &c. of him the said E. F., and against the peace and dignity of the Commonwealth aforesaid.

215. *For a Libel on a Person who was dead.*[3]

The jurors &c., upon their oath present, that A. B., of &c., yeoman, being a person of a revengeful and malicious disposi-

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[1] Altered from a precedent in 3 Chitt. 911. See 2 Camp. Rep. 563, where this was held libellous.

[2] The process, whether pending before a magistrate, or any other court or tribunal, ought to be correctly set forth.

[3] See a similar precedent, 3 Chitt. 914, note (*k*), where it is said that the averment of the intent to vilify the family, is essential to the validity of the indictment. See also 4 T. R. 126.

tion, and maliciously intending to injure, defame, vilify, and disgrace the memory, character, and reputation of one C. D., then deceased, and to bring the family, relations, and descendants of the said C. D. into disgrace, contempt, and infamy, and to cause it to be believed, that the said C. D., in his life time, was a person of a vicious, immoral, and depraved mind and disposition, and destitute of filial duty and affection, and that the said C. D. led an immoral and profligate life, on at &c., in said county, unlawfully and maliciously did print and publish, and did cause and procure to be printed and published, in a certain newspaper called "*The World*," a certain false, scandalous, and malicious libel, of and concerning the said C. D., which said false, scandalous, and malicious libel is of the purport and effect following, to wit, [*here set forth the libel, with proper inuendoes*,] to the great scandal and disgrace of the memory, reputation, and character of the said C. D., and against the peace and dignity of the Commonwealth aforesaid.

216. *For publishing an obscene Print.*[1]

The jurors &c., upon their oath present, that A. B., of &c., being an evil disposed person, and devising and intending the morals as well of the youth as of other citizens of this Commonwealth to corrupt and debauch, on the day of at in the county aforesaid, unlawfully, wantonly, and maliciously did utter and publish to one C. D., a citizen of said Commonwealth, a certain lewd, scandalous, and obscene print on paper, representing a man in an indecent and obscene posture with a woman, that is to say, in the act and posture of carnal copulation with each other, which said lewd, scandalous, and obscene print was contained and published in a certain printed book, entitled "Memoirs of a Woman of Pleasure," to the manifest corruption and subversion of the morals and manners of the youth of this Commonwealth and of the citizens thereof, to the evil and pernicious example of all others in like case to offend, and against the peace and dignity of the Commonwealth aforesaid.

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[1] This is the case of *Commonwealth* vs. *Holmes*, 17 Mass. R. 336. This indictment did not allege what the obscene posture was, and it was decided in that case not to be necessary; perhaps, however, strict technical accuracy may require it.

See another precedent in 2 Stark. C. P. 636, against a bookseller, for uttering and selling a pamphlet containing an obscene print.

217. *For publishing a seditious Libel.*[1]

The jurors &c., upon their oath present, that A. B., of &c., being a malicious, seditious, and ill-disposed person, and greatly disaffected to the government of the United States [*or the government of the state of one of the United States of America, as the case may be,*] and to the administration thereof, and maliciously and seditiously devising and intending to stir up and excite discontents and seditions among the citizens of the said United States, [*or the said state of as the case may be,*] and to alienate and withdraw the fidelity and allegiance of the said citizens from the said government and the administration thereof, on at &c., maliciously and seditiously did write and publish, and cause and procure to be written and published, a certain false, malicious, and seditious libel of and concerning the said government and the administration thereof, which said libel is of the following purport and effect, that is to say, [*here insert the libel, verbatim, with proper inuendoes,*] in contempt of the government aforesaid, its constitution and laws, and the administration of the same; to the evil and pernicious example of all others in like case to offend, and against the peace and dignity of the Commonwealth aforesaid.[2]

218. *For writing a libellous Letter to the Prosecutor.*[3]

The jurors &c., upon their oath present, that A. B., of &c., maliciously and unlawfully intending one C. D. to injure, oppress, and vilify, and bring into contempt and ridicule, on at in said county, unlawfully and maliciously did write and cause to be written a certain false, malicious, and defamatory libel of and concerning the said C. D., which said false, malicious, and defamatory libel is of the following purport and effect, that is to say, [*here insert the libel, with proper inuendoes,*] which said false, malicious, and defamatory libel he the said A. B. afterwards, to wit, on the same day and year afore-

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[1] Cro. C. A. 73. This was the indictment against Dr. John Horne, for a libel upon the British government, for their proceedings against the American colonies, at the commencement of the American revolution. See also 2 Stark. C. P. 625.

[2] If the libel is printed, state it as follows; "did maliciously and seditiously print and publish, and cause and procure to be printed and published, in a certain newspaper, called and entitled [*here insert the title of the newspaper,*] a certain false, malicious, and seditious libel," [*as stated in the foregoing precedent.*]

[3] Cro. C. A. 70, 71.

said, at aforesaid, in the county aforesaid, maliciously and unlawfully did send and deliver, and cause to be sent and delivered to the said C. D., in the form of a letter, directed to the said C. D., by the name of [*here insert the superscription to the letter*;] to the great injury, damage, and scandal of the said C. D., and against the peace and dignity of the Commonwealth aforesaid.[1]

219. *For a blasphemous Libel.*[2]

The jurors &c., upon their oath present, that A. B., of disregarding the laws and religion of this Commonwealth, and profanely devising and intending to bring the Holy Scriptures and the Christian religion into disbelief and contempt among the people of this Commonwealth, on at unlawfully and wickedly did compose, print, and publish, and did cause and procure to be composed, printed, and published, a certain scandalous, impious, blasphemous, and profane libel, of and concerning the Holy Scriptures and of and concerning the Christian religion; in one part of which said libel, among other things, there were and are contained certain scandalous, impious, and blasphemous matters and things of and concerning the Holy Scriptures and the Christian religion, according to the purport and effect following, to wit, [*here set out the libellous passage*;] to the great scandal and reproach of the Christian religion, and against the peace and dignity of the Commonwealth aforesaid.

220. *For a Libel upon a Senator of the United States.*[3]

The jurors &c., upon their oath present, that T. L., of being a person regardless of the integrity and patriotism, which the citizens of this Commonwealth and of the United States, when elected to and entrusted with offices of honor, trust, and responsibility, in the administration of the government of this Commonwealth and of the United States, ought to possess and sustain, and unlawfully and maliciously devising and intending to

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[1] A second count may be added, leaving out what relates to the *sending* of the libel, and alleging, instead thereof, "did write and publish, and cause to be written and published," &c.

[2] This precedent is taken from Archb. C. P. 294.

[3] This is the substance of the indictment against T. L. Esq., for a libel upon D. W. It was taken from an English precedent, which was remarkable for its prolix prefatory averments, all of which are here left out, excepting those which had a direct and true application to the public character and official situation of the prosecutor.

traduce, vilify, and bring into contempt and detestation one D. W., of &c., who was, on the day hereafter mentioned, and still is, one of the senators in the Congress of the United States of America for the state of Massachusetts, duly and constitutionally elected and appointed to that office, and also unlawfully and maliciously intending to insinuate and cause it to be believed, that the said D. W. and divers other distinguished and patriotic citizens of this Commonwealth had been engaged in an atrocious and treasonable plot to dissolve the union of the said United States, then and still constituting the government of the said United States under the present constitution thereof, and further maliciously intending to make it to be believed, that J. Q. A., then the president of the United States, had denounced the said D. W. as a traitor to his country, on at unlawfully, deliberately, and maliciously did compose, print, and publish, and did cause and procure to be composed, printed, and published, in a certain newspaper called the "Jackson Republican," of and concerning him the said D. W., an unlawful and malicious libel, according to the purport and effect, and in substance as follows, that is to say, [*here insert the libellous publication, with all necessary inuendoes and averments*;] to the great injury, scandal, and disgrace of the said D. W., and against the peace and dignity of the Commonwealth aforesaid.

LOTTERY.

Forms of Indictment upon the Statutes prohibiting the Sale &c. of Lottery Tickets.

221. *For selling a Lottery Ticket: On the Statute of Massachusetts of* 1825, *c.* 184, § 1.

The jurors &c., upon their oath present, that A. B., of &c., on at did unlawfully offer for sale, and did unlawfully sell to one C. D. a lottery ticket in a certain lottery not authorized by the laws of this Commonwealth, called the lottery; which said lottery ticket was then and there taken and kept by the said C. D., so that the jurors aforesaid cannot set forth the tenor or substance thereof; against the peace of said

Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

222. *For exhibiting a Sign or other emblematical Representation of a Lottery, &c.: On the Statute of Massachusetts of 1828, c. 134, § 1.*[2]

The jurors &c., upon their oath present, that A. B., of &c., on at did unlawfully exhibit a sign, symbol, and emblematical representation of a lottery, and of the drawing thereof, called the lottery, which said lottery was not authorized by the laws of this Commonwealth, by [*here describe the manner in which the sign, symbol, &c. was exhibited,*] and did thereby indicate where lottery tickets in said lottery might be purchased and received, and did thereby invite and intice the good citizens of this Commonwealth unlawfully to purchase and receive the said tickets in the aforesaid lottery; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

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[1] The same form may be adopted for all the other breaches of the statute, using the identical words of the statute in which each offence is described, as follows; "did advertise, and cause to be advertised for sale," certain lottery tickets in a certain lottery, called the lottery, which lottery was not authorized by the laws of this Commonwealth; and the same form is to be adopted for advertising "parts of tickets."

Also, for drawing a lottery, as follows, "did then and there draw, and aid and assist in drawing a certain lottery, called &c., not authorized," &c.

Also, for being "concerned in the management and conducting of said lottery within this Commonwealth."

The penalties in this section of the statute may be recovered by indictment or information in the Supreme Judicial Court, by the attorney or solicitor general; and by the county attorney in the Court of Common Pleas, or Municipal Court in the city of Boston.

[2] By this section of the statute, its penalties may be recovered for the use of the Commonwealth, if prosecuted for by the attorney or solicitor general. They may also be recovered by any other person; in which latter case, half the penalty is given to the prosecutor, and the other half to the Commonwealth. But no mode of prosecution, whether by indictment, information, or action *qui tam*, is directed in the statute.

MAINTENANCE.

223. *For Maintenance of an Action of Debt.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at in said county, did unjustly and unlawfully maintain and uphold a certain suit which was then depending in the [*here state the Court in which the action was pending*,] between C. D., plaintiff, and E. F., defendant, in a certain plea of debt, on behalf of the said C. D., against the said E. F., to the manifest hindrance and disturbance of justice; to the great damage of him the said E. F., and against the peace and dignity of the Commonwealth aforesaid.

224. *For Maintenance of an Action of Ejectment.*[2]

The jurors &c., upon their oath present, that A. B., of &c., on and for the space of one year next following, at in said county, unlawfully and unjustly did maintain a certain action then pending in the [*here insert the name of the Court*,] between one C. D., plaintiff, and one E. F., defendant, in a plea of ejectment of a certain tract or parcel of land &c., [*here describe the demanded premises as in the writ;*] on the behalf of the said C. D., and against the said E. F., to the manifest hindrance and disturbance of justice; to the great damage of the said C. D., and against the peace &c.

MALICIOUS MISCHIEF.

225. *For Maliciously Burning a Quantity of Boards.*[3]

The jurors &c., upon their oath present, that A. B., of &c., yeoman, on at in the county aforesaid, a certain quantity of boards, containing one thousand feet, of the value of

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[1] 2 Chitt. 234; Burn's Justice, *Maintenance*; 2 Stark. 678.

[2] 1 Trem. 178. This precedent was drawn by Saunders. It differs from the last preceding precedent only in the description of the court and the name of the suit.

[3] Statute of Massachusetts of 1804, c. 131, § 4.

ten dollars, of the goods, chattels, and property of one C. D. there lying and being, did wilfully and maliciously set fire to, burn and consume; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

226. *For wilfully and maliciously maiming and disfiguring a Horse.*[2]

The jurors &c., upon their oath present, that A. B., of &c., on at in the county aforesaid, a certain gelding of the value of one hundred dollars, of the goods, chattels, and property of one C. D., did then and there wilfully and maliciously maim and disfigure, by wilfully and maliciously cutting off the ears of said gelding, whereby he was greatly injured and rendered of little value; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[3]

MANSLAUGHTER. — See "Murder."

MARRIAGE UNLAWFULLY SOLEMNIZED.

227. *For solemnizing a Marriage, without lawful Authority.*[4]

The jurors &c., upon their oath present, that A. B., of &c., on at in the county aforesaid, did unlawfully, knowingly, and wilfully join in marriage, and solemnize matrimony between C. D. and one F. E., then a single woman; he the said

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[1] The same form is applicable to, and may be adopted as to burning all the other articles of property mentioned in the statute.

[2] Statute of Massachusetts of 1804, c. 131, § 4. See 2 East, P. C., c. 22, § 18, 19, for an exposition of the English statute.

[3] This form of a precedent may be adopted for all the variety of cases mentioned in this branch of the statute. An indictment at common law may be maintained for the wilful destruction of other animals not mentioned in the statute, such as hogs, poultry, &c. Prosecutions at common law for these offences have been sustained in the Supreme Judicial Court of Massachusetts, tried at *nisi prius*, but not reported. See the case of *Commonwealth* v. *Leach*, 1 Mass. R. 59.

[4] Statute of Massachusetts of 1786, c. 3, § 6.

A. B. not being authorized and empowered to solemnize marriages by virtue of the act of the said Commonwealth, entitled, "An act for the orderly solemnization of marriages," nor being authorized thereto in any other manner, or by any other legal power and authority whatever; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

MANSLAUGHTER.

228. *Against the Driver of a Cart for driving over Deceased.*[2]

The jurors &c., upon their oath present, that A. B., of &c., on [*with force and arms*,][3] at in the county aforesaid, in the public highway there, in and upon one C. D., in the peace of the said Commonwealth then and there being, feloniously and wilfully did make an assault, and a certain cart of the value of ten dollars, then and there drawn by two horses, which he the said A. B. was then and there driving in and along the highway aforesaid, in, upon, and against the said C. D. feloniously and wilfully did force and drive; and him the said C. D. did thereby, then and there, throw to, and upon the ground, and did then and there feloniously and wilfully force and drive one of the wheels of the said cart against, upon, and over the head of him the said C. D. then lying upon the ground, and thereby, did then and there give to the said C. D. in and upon the head of him the said C. D. one mortal fracture and contusion, of the breadth of four inches, and of the depth of four inches, of which said mortal fracture and contusion, the said C. D. then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B, him the said C. D., then and there in manner and form aforesaid, feloniously and

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[1] See an able and learned exposition of the statute on which this precedent is founded, and of the nature and objects of the marriage contract, by Chief Justice Parsons, in the case of *The Inhabitants of Milford* v. *The Inhabitants of Worcester*, 7 Mass. R. 48.

[2] Statute of Massachusetts, 1804, c. 123, and 1818, c. 124.

[3] Not necessary.

wilfully did kill and slay; against the peace of said Commonwealth, and contrary to the form of the several statutes in such case made and provided.[1]

MAYHEM.

229. *For Mayhem by slitting the Nose.*[2]

The jurors &c., upon their oath present, that A. B., of &c., on with force and arms, at in the county aforesaid, contriving and intending one C. D. to maim and disfigure, in and upon the said C. D. in the peace of said Commonwealth then and there being, with set purpose and aforethought malice, and with intention him the said C. D. to maim and disfigure, unlawfully and maliciously[3] did make an assault; and that he the said A. B. with a certain iron bill, (of the value of five cents,)[4] which he the said A. B. in his right hand then and there had and held, the nose of him the said C. D. with set purpose and aforethought malice, then and there unlawfully and maliciously did slit, with intention the said C. D. in so doing, in manner aforesaid, to maim and disfigure; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

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[1] See similar precedents, 3 Chitt. 783; 2 Stark. 381. Manslaughter may be described in the indictment exactly like murder, omitting the words *murder* and *malice aforethought*, 3 Chitt. 783, note (*v*.); 4 Bl. Com. 190 - 193. This note in Chitty is undoubtedly correct, but it is inconsistent with the precedent in 2 Stark. 362, 363.

[2] Statute of Massachusetts of 1804, c. 123, § 4. See a precedent in 3 Chitt. 787, on the Coventry Act, 22 & 23 *Car.* 2, c. 1, said to be taken from Cro. C. C. 264; but in the 6th edition of Cro. C. C. this precedent is on page 430.

[3] The word *feloniously* is used in the English precedents, but is changed for *maliciously* in this, upon the authority of *Commonwealth* v. *Newall et al.*, 7 Mass. R. 245. This form will answer for all the other species of Mayhem mentioned in the section of the statute on which this precedent is drawn. All persons present aiding and abettin may be charged as principals. If *not present*, but accessories *before* the fact, they may be charged as such. See *ante*, p. 47, Accessory, Mayhem, and the authorities there cited, viz., 3 Chitt. 787; *Commonwealth* v. *Newall et al.* 7 Mass. R. 245.

[4] Not necessary. See note (4) to precedent 233, *post*.

MISPRISION OF FELONY.

230. *Indictment for Misprision or Concealment of Felony.*[1]

The jurors &c., upon their oath present, that A. B., [*here set out the offence by the original offender, in the usual form, whether it be murder, larceny, or any other felony, and then proceed as follows:*] and the jurors aforesaid, upon their oath aforesaid, do further present, that C. D., late of &c., being a person of evil and unprincipled mind and disposition, and well knowing the premises, and also well knowing the name and person and usual place of resort of the said A. B., but devising and intending, as much as in him lay, to hinder and obstruct the due course of law and justice, and to cause the said A. B. to go and escape for the said offence, so by him committed as aforesaid, afterwards, to wit, on at aforesaid, unlawfully, maliciously, and wilfully did conceal and keep secret, and neglect to discover the said felony, so committed by the said A. B. as aforesaid, and the name, person, and usual place of resort of A. B. did utterly refrain, forbear, and neglect to discover and make known; against the peace and dignity of the Commonwealth aforesaid.

231. *Another Form for Misprision of Felony.*[2]

The jurors &c , upon their oath present, that Richard Crowninshield, junior, late of Danvers, in the county of Essex, machinist, on the sixth day of April now last past, with force and arms, at Salem, in the county aforesaid, in and upon one Joseph White, feloniously, wilfully, and of his malice aforethought, did make an assault; and that he the said Richard Crowninshield, junior, with a certain deadly weapon called a bludgeon, which he the said R. C. jr., in his right hand then and there had and held, the aforesaid Joseph White, in and upon the left temple of him the said Joseph White, then and there, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound; giving to the said Joseph White, then and there with the bludgeon aforesaid, in and upon the left temple of him the said Jo-

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[1] This precedent is from 2 Chitt. 232, and is said in a note there to have been settled by an able lawyer. It is the only precedent for a misprision of felony that I have been able to find in any English book of precedents of indictments.

[2] This form is from the original indictment against J. J. Knapp, junior, intended to be used in case he was not convicted as an accessory before the fact to J. F. Knapp. He was convicted and executed as such accessory.

seph White, one mortal wound, of the breadth of three inches, and of the length and depth of three inches; of which said mortal wound the said Joseph White then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said R. C. jr. the aforesaid Joseph White, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present, that Joseph Jenkins Knapp, junior, of Salem, &c., well knowing the premises, and also well knowing the person, name, and usual place of resort of the said R. C. jr., but devising and intending, as much as in him lay, to hinder and obstruct the due course of law and justice, and to cause the said R. C. jr., to go and escape unpunished for the felony and murder so by him as aforesaid done and committed, afterwards, to wit, on the seventh day of April, in the year aforesaid, at Salem, in the county of Essex aforesaid, unlawfully, wilfully, and maliciously did conceal and keep secret, and neglect to discover the said felony and murder, so as aforesaid done and committed by the said R. C. jr.; and the name, person, and usual place of resort of the said R. C. jr., unlawfully, wilfully, and maliciously did refrain and forbear to make known and disclose; against the peace and dignity of the Commonwealth aforesaid.

232. *For a Misprision of an intended Felony.*

The jurors for said Commonwealth, upon their oath present, that one Richard Crowninshield, junior, late of Danvers, in the county of Essex aforesaid, machinist, now deceased, and one John Francis Knapp of Salem, in the county aforesaid, mariner, and one Joseph Jenkins Knapp, junior, of Wenham, in the county aforesaid, mariner,[1] on the sixth day of April, in the year of our Lord one thousand eight hundred and thirty, at Salem aforesaid, in the county aforesaid, wickedly, injuriously, and maliciously did conspire, combine, agree, intend, and determine,[2] within a few days from the said second day of April in the year aforesaid, in and upon Joseph White, in the peace of the said

[1] The words "not having the fear of God before his eyes," &c. are omitted, being unnecessary and superfluous.

[2] Hawk b. 2, c. 29, § 23. The concealment of an *intended* felony is misprision of felony; and he who conceals a felony, which he knows is intended to be committed, is guilty of a misprision.

Commonwealth then and there being, feloniously, wilfully, and of their malice aforethought to make an assault, and him the said Joseph White then and there feloniously, wilfully, and of their malice aforethought to kill and murder.

And the jurors aforesaid, upon their oath aforesaid, do further present, that George Crowninshield, of Danvers aforesaid, in the county aforesaid, machinist, being a person of a wicked and evil mind and disposition, and well knowing the premises, and also well knowing the names, persons, and usual places of abode and resort of the said Richard Crowninshield, junior, John Francis Knapp, and Joseph Jenkins Knapp, junior, but devising and intending, as much as in him lay, that the said Richard Crowninshield, junior, John Francis Knapp, and the said Joseph Jenkins Knapp, junior, the intended felony and murder aforesaid, in manner and form aforesaid, should carry into full effect, without being prevented and brought to justice therefor, on the second day of April in the year aforesaid, and from the same second day of April in the year aforesaid, to the seventh day of April in the year aforesaid, at Danvers aforesaid, in the county aforesaid, unlawfully, wickedly, wilfully, maliciously, and contemptuously, did conceal, keep secret, and neglect to discover the felony and murder, so agreed, intended, and determined to be done and committed in manner aforesaid; and the names, persons, and usual places of resort of the said Richard Crowninshield, junior, John Francis Knapp, and of the said Joseph Jenkins Knapp, junior, did, during all the time aforesaid, utterly refrain and forbear to disclose and make known; in contempt of the laws of the land, in evil example to others in like case to offend, and against the peace and dignity of the Commonwealth aforesaid.[1]

MURDER.

233. *For Murder, by shooting with a Pistol.*[2]

The jurors &c., upon their oath present, that A. B., of &c., yeoman, (not having the fear of God before his eyes, but being

[1] This indictment was drawn by the present Attorney General of Massachusetts.

[2] 3 Chitt. 752.

moved and seduced by the instigation of the Devil,)[1] on *with force and arms*, at[2] in the county aforesaid, in and upon the body of one C. D., *in the peace of said Commonwealth then and there being*,[3] feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said A. B., a certain pistol, *of the value of two dollars*,[4] then and there charged with gun-powder and one leaden bullet, which said pistol, he the said A. B. in his right hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said C. D.; and that the said A. B. with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gun-powder aforesaid, by the said A. B discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound the said C. D., in and upon the right side of the belly of him the said C. D., giving to him the said C. D. then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said A. B., in and upon the right side of the belly of him the said C. D., one mortal wound of the depth of four inches, and of the breadth of half an inch; of which said mortal wound, he the said C. D. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., him the said C. D., in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder;

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[1] Not necessary. See note (3) to the next precedent.

[2] The venue must be laid where the death occurred. Where the wound is given in one county and the death happens in another, an indictment thereof may be found in the latter. See the case of *Commonwealth* v *Parker et al.* 2 Pick. 550, where this question was discussed and decided.

[3] This allegation, though usual, is not necessary. 2 Chitt. 733, 734; 2 Hale, 186; Hawk. b. 2, c. 25, § 73; 1 Russ. on Crimes, 677. The terms *with force and arms* are not necessary, being so fully implied in the description of the violence employed. Hawk. b. 2, c. 23, § 85; 3 Chitt. 751, note (*k*). 2 Hale, 187.

[4] This allegation as to the value of the instrument is not necessary. 1 East, P. C. c. 5, § 8; Foster, 265, 266; who states, that a *deodand* is a forfeiture originally founded in an age of *extreme ignorance.* The omission to state the value of the deodand, will not vitiate the indictment as to the offence. Cro. C. C. 441, 442, (6th Ed.) note (*c*); 1 H. H. 419; 1 H. H. c. 32.

against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

234. *For Murder by stabbing with a Knife.*[2]

The jurors &c., upon their oath present, that A. B., of &c., laborer,[3] on the day of at in the county aforesaid, in and upon one C. D., *in the peace of said Commonwealth then and there being*,[4] feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said A. B., with a certain knife (of the value of ten cents,)[5] (which he the said A. B. in his right hand then and there had and held,)[6] the said C. D. in and upon the left side of the body between the ribs of him the said C. D., then and there feloniously, wilfully, and of his malice aforethought, did strike and thrust, giving to the said C. D. then and there, with the knife aforesaid, in and upon

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[1] If the party did not immediately die of the mortal wound, the indictment must conclude as follows, *viz.*, set forth the charge precisely as in the foregoing precedent, until you come to the words "of which mortal wound," and then conclude thus: "of which mortal wound the said C. D., on and from the said day of until the day of at B. aforesaid, in the county aforesaid, did suffer and languish, and languishing did live; on which said day of at B. aforesaid, in the county aforesaid, he the said C. D. of the mortal wound aforesaid, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. him the said C. D., in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

There are several precedents in Chitty, Starkie, and others, where one is charged as principal, and others as being present aiding and abetting. This can never be necessary, as all that are present aiding and assisting are equally principals with him who gave the mortal stroke, and may be charged as such. 1 East, P. C. c. 5, § 121; 1 Russ. 628, (Davis's Ed.) are full to the point.

[2] See similar precedents, 3 Chitt. 757; Cro. C. C. 440, (6th Ed.); 2 Stark. 381.

[3] The allegation "not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil," is usually introduced in this place in the English precedents, but it is not necessary. 6 East, 472–474; Burn J. *Indictment*, 19; 3 Chitt. C. L. 750, note (*h*). It is obsolete, and is not retained in any precedent in this collection.

[4] This allegation is unnecessary, and may be injudicious. 3 Chitt. 751, note (*m*); 2 Hale, 186; 2 Stark. 363, note (*k*). See page 172.

[5] This allegation is not necessary. See note (4) in the next preceding precedent.

[6] This allegation is usual; but East doubts the necessity of it. 1 East P. C. c. 5, § 108.

the aforesaid left side of the body between the ribs of him the said C. D. one mortal wound, of the breadth of three inches, and of the depth of six inches; of which said mortal wound he the said C. D. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. him the said C. D., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

235. *For Murder, by cutting the Throat.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at in the county aforesaid, *with force and arms*, in and upon one C. D. feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said A. B., with a certain knife, made of iron and steel, which he the said A. B. in his right hand then and there had and held, the throat of him the said C. D. feloniously, wilfully, and of his malice aforethought, did strike and cut; and that the said A. B., with the knife aforesaid, by the striking and cutting aforesaid, did then and there give to him the said C. D., in and upon the said throat of him the said C. D., one mortal wound, of the length of three inches, and of the depth of two inches; of which said mortal wound the said C. D., from the said day of to the day of aforesaid, at aforesaid, in the county aforesaid, did suffer and languish, and languishing did live; on which said day of aforesaid, in the year aforesaid, at aforesaid, in the county aforesaid, he the said C. D., of the said mortal wound, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. him the said C. D., in manner and form aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

236. *For Murder, by throwing a Knife.*[2]

The jurors &c., upon their oath present, that A. B., of B., in the county of S., gentleman, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one C. D. feloniously, wilfully, and of his malice aforethought, did make an assault, and that he the said

[1] See 3 Chitt. 757.

[2] From 3 Chitt. 758.

A. B., with a certain large knife, made of iron and steel,[1] which he the said A. B. in his right hand then and there had and held, at and against him the said C. D. then and there feloniously, wilfully, and of his malice aforethought, did cast and throw; and him the said C. D., with the knife aforesaid, so cast and thrown as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike and stab, and that the said A. B. with the knife aforesaid, so cast and thrown as aforesaid, in and upon the left side of the body of him the said C. D., then and there feloniously, wilfully, and of his malice aforethought, did strike and stab, and that he the said A. B., with the knife aforesaid, so cast and thrown as aforesaid, did then and there feloniously, wilfully, and of his malice aforethought, give to the said C. D., in and upon the left side of the body of him the said C. D., one mortal wound, of the breadth of one inch, and of the depth of three inches; of which said mortal wound, he the said C. D. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that he the said A. B. him the said C. D., in manner and form aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

237. *For Murder, by casting a Stone.*[2]

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E F., feloniously, wilfully, and of his malice aforethought, did make an assault, and that he the said C. D. a certain stone, of no value,[3] which he the said C. D. in his right hand then and there had and held, in and upon the right side of the head, near the right temple of him the said E. F., then and there feloniously, wilfully, and of his malice aforethought, did cast and throw, and that the said C. D., with the stone aforesaid, so as aforesaid cast and thrown, the aforesaid E F., in and upon the right side of the head, near the right temple of him the said E. F., then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, giving to the said E. F., by the casting and throwing of the stone aforesaid, in and upon the

[1] See note (4) to precedent 233, as to deodands.

[2] Cro. C. C. 438, 439, (6th Ed.); 3 Chitt. 758; 2 Stark. 380.

[3] See note (4) to precedent 233.

right side of the head, near the right temple of him the said E. F., one mortal wound, of the length of one inch, and of the depth of one inch; of which said mortal wound he the said E. F., from the said day of in the year aforesaid, to the day of in the year aforesaid, at B. aforesaid, in the county aforesaid, did languish, and languishing did live; on which said day of in the year aforesaid, at B. aforesaid, in the county aforesaid, the said E. F., of the mortal wound aforesaid, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

238. *For Murder, by striking with a Poker.*[1]

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., feloniously, wilfully, and of his malice aforethought, did make an assault; and that he the said C. D. then and there with a certain iron poker, which he the said C. D. in both his hands then and there had and held, the said E. F., in and upon the back part of the head of him the said E. F., then and there feloniously, wilfully, and of his malice aforethought, did strike, giving unto him the said E. F. then and there, with the said iron poker, by the stroke aforesaid, in manner aforesaid, in and upon the back part of the head of him the said E. F., one mortal wound, of the length of three inches, and of the depth of one inch; of which said mortal wound, he the said E. F., on the said day of at B. aforesaid, in the county aforesaid, did languish, and languishing did live; on which same day of aforesaid, at B. aforesaid, in the county aforesaid, he the said E. F., of the said mortal wound, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[2]

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[1] 3 Chitt. 761; Cro. C. A. 330.

[2] If there are divers mortal wounds given, and they are mentioned or stated in the indictment, they must all be specially described, and the dimensions of all of them specified, and then it must be alleged, that the deceased died of

239. *For Murder, by beating with Fists, and kicking on the Ground.*[1]

The jurors &c., upon their oath present, that C. D., of said B., in the county aforesaid, laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said C. D. then and there feloniously, wilfully, and of his malice aforethought, did strike, beat, and kick the said E. F. with his hands and feet, in and upon the head, breast, back, belly, sides, and other parts of the body of him the said E. F., and did then and there feloniously, wilfully, and of his malice aforethought, cast and throw the said E. F. down, unto and upon the ground, with great force and violence there, giving to the said E. F. then and there, as well by the beating, striking, and kicking of him the said E. F., in manner and form aforesaid, as by the casting and throwing of him the said E. F. down as aforesaid, several mortal strokes, wounds, and bruises, in and upon the head, breast, back, belly, sides, and other parts of the body of him the said E. F., to wit, one mortal wound on the left side of the belly of him the said E. F., of the length of five inches, and of the depth of three inches, [*here state the other wounds in the same way*,] of which said last mentioned mortal strokes, wounds, and bruises, he the said E. F., from the said day of aforesaid, to the day of in the year aforesaid, at B. aforesaid, in the county aforesaid, did languish, and languishing did live; on which said day of in the year aforesaid, at B. aforesaid, in the county aforesaid, he the said E. F., of the mortal strokes, wounds, and bruises aforesaid, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

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them all. For this, see 3 Chitt. C. L. 761, note (*d*). But if one mortal wound is properly described, and it is alleged that the deceased died of it, it is presumed to be sufficient.

[1] Taken from 3 Chitt. C. L. 762, note (*g*), where the necessity of describing the particular wounds is stated. See other precedents, Cro. C. A. 306, and 2 Stark. 375, where no particular description of any wound is given.

240. *For Murder, by choking and strangling.*[1]

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F. feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said C. D., with both his hands about the neck and throat of her the said E. F., then and there feloniously, wilfully, and of his malice aforethought, did fix and fasten; and that he the said C. D., with both his hands so as aforesaid fixed and fastened about the neck and throat of her the said E. F., her the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did choke and strangle; of which said choking and strangling, she the said E. F. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. her the said E. F. then and there, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

241. *For Murder, by riding over a Person with a Horse.*[2]

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F. feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said C. D. then and there riding upon a horse, the said horse in and upon the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did ride and force, and him the said E. F., with the horse aforesaid, then and there, by such riding and forcing as aforesaid, did throw to the ground; by means whereof the said horse, with his hinder feet, him the said E. F., so thrown to and upon the ground as aforesaid, in and upon the back part of the head of him the said E. F., did then and there strike and kick, thereby then and there giving to him the said E. F., in and upon the back part of the head of him the said E. F., one mortal fracture and contusion, of the breadth of two inches, and of the depth of one inch; of which said

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[1] 3 Chitt. C. L. 764; 2 Stark. 373; several counts, for striking with a stick, choking, squeezing, &c.

[2] 3 Chitt. 765; 2 Stark. 380.

mortal fracture and contusion, the said E. F. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

242. *For Murder, by strangling with a Handkerchief.*[1]

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county of S. aforesaid, in and upon one E. F. feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said C. D., with a handkerchief, about the neck of him the said E. F., then and there feloniously, wilfully, and of his malice aforethought, did put, fasten, and bind; and that the said C. D., with the said handkerchief, about the neck of him the said E. F., then as aforesaid put, fastened, and bound, him the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did choke and strangle; of which choking and strangling the said E. F. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D., in manner and form aforesaid, him the said E. F. feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

243. *For the Murder of a Bastard Child, by folding it in a Cloth.*[2]

The jurors &c., upon their oath present, that C. D., of said B., single woman, on the day of now last past, at B. aforesaid, in the county aforesaid, being pregnant with a certain female[3] child, afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, the said female child alone[4] and secretly from her body did bring forth alive, which said female child, so born alive, was, by the laws of this Commonwealth, a

[1] 3 Chitt. 766, note (*q*); 2 Stark. 379, note (*a*), where it is said to be taken from 4 St. Tr. 484, and to be the case of *Rex* vs. *Harrison*, for the murder of Dr. Clenche.

[2] 3 Chitt. 767.

[3] The sex is material, and must be alleged. See 2 Stark. 383, note (*f.*)

[4] The words of the statute of Massachusetts, of February, 1785, are "shall willingly be delivered in secret by herself."

bastard; and that the said C. D. afterwards, to wit, on the same day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the said female bastard child, feloniously, wilfully, and of her malice aforethought did make an assault; and that the said C. D., with both her hands, the said female bastard child, in a certain linen cloth, feloniously, wilfully, and of her malice aforethought, did put, place, fold, and wrap up; by means of which said putting, placing, folding, and wrapping up of the said female bastard child, in the said linen cloth, by her the said C. D. as aforesaid, the said female bastard child was then and there choked, suffocated, and smothered; of which said choking, suffocation, and smothering, the said female bastard child then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. the said female bastard child, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

244. *For Murder, by throwing a Child into a Privy.*[1]

The jurors &c., upon their oath present, that C. D., late of said B., single woman, on the day of now last past, being pregnant with a female[2] child, afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, the said female child, alone[3] and in secret from her body did bring forth alive, which said female child, so born alive, was, by the laws of this Commonwealth, a bastard; and that the said C. D., afterwards, to wit, on the same day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the said female bastard child, feloniously, wilfully, and of her malice aforethought, did make an assault; and that the said C. D., with both her hands, the said female bastard child, into a certain privy there situate, wherein was a great quantity of human excrements and other filth, then and there feloniously, wilfully, and of her malice aforethought, did cast and throw; by reason of which said casting and throwing of the said female bastard child into the said privy, by her the said C. D., in manner as aforesaid, the said female bastard child, in

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[1] 3 Chitt. 767.

[2] The sex is material to be alleged. See note (3) to the next preceding precedent.

[3] See note (4) to the next preceding precedent.

the said privy, with the excrements and filth aforesaid, was then and there choked and suffocated; of which said choking and suffocation the said female bastard child then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. the said female bastard child, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

245. *For killing a Bastard Child, by Strangling.*[1]

The jurors &c., upon their oath present, that C. D., of &c., single woman, on the day of now last past, being pregnant with a male child, the same day and year, at B. aforesaid, did willingly bring forth the said child alive, of the body of her the said C. D., in secret by herself, which said male child, so being born alive, was, by the laws of this Commonwealth, a bastard; and that the said C. D., afterwards, to wit, on the same day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the said male child, feloniously, wilfully, and of her malice aforethought, did make an assault; and that she the said C. D., with both her hands about the neck of him the said child then and there fixed, him the said child then and there feloniously, wilfully, and of her malice aforethought, did choke and strangle; of which said choking and strangling, the said child then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. the aforesaid male child, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

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[1] 3 Chitt. 768; Cro. C. C. (7th Ed.) 288. See 2 Stark. 383, note (*h*), where it is said that the allegation "was delivered *alone*," does not appear to be necessary. See note (4) to precedent 243, *ante*.

In the statute of Massachusetts, passed February 26, 1785, made to prevent the destroying and murdering of bastard children, the words are, "in secret by herself."

246. *For the Murder of a Child, by hiding and starving it.*[1]

The jurors &c., upon their oath present, that C. D., of said B., single woman, on the day of now last past, being pregnant with a male child, the same day and year aforesaid, at B. aforesaid, did willingly bring forth the said child alive, of the body of her the said C. D., in secret by herself; which said male child, so being born alive, was, by the laws of this Commonwealth, a bastard; and that she the said C. D., on the day of in the year aforesaid, at B. aforesaid, in the county aforesaid, with force and arms, in and upon the said male child, feloniously, wilfully, and of her malice aforethought, did make an assault; and that the said C. D. the said male child, so being alive, did then and there take and carry to a certain shed there situate, and the same child, so being alive, did then and there in the said shed, feloniously, wilfully, and of her malice aforethought, hide, secrete, and conceal; and the same child, so being alive, and so being hidden, secreted, and concealed, she the said C. D. did then and there feloniously, wilfully, and of her malice aforethought, leave and desert; and to nourish, sustain, and provide for the said male child, so being alive, she the said C. D., feloniously, wilfully, and of her malice aforethought, did wholly neglect and refuse; by reason of which said hiding, secreting, and concealing the same child, in manner and form aforesaid, by the said C. D., and of the said refusal and neglect of the said C. D. to nourish, sustain, and provide for the said male child, the said child then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. the said male child, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

247. *For Murder, by Drowning.*[2]

The jurors &c., upon their oath present, that C. D., of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said C. D. then and there feloniously, wilfully, and of his malice aforethought, did take the

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[1] 3 Chitt. 768, 769.

[2] 3 Chitt. 770; 2 Stark. 373.

said E. F. into both the hands of him the said C. D., and did then and there feloniously, wilfully, and of his malice aforethought, cast, throw, and push the said E. F. into a certain pond there situate, wherein there was a great quantity of water; by means of which said casting, throwing, and pushing of the said E. F. into the pond aforesaid, by the said C. D., in form aforesaid, he the said E. F., in the pond aforesaid, with the water aforesaid, was then and there choked, suffocated, and drowned; of which said choaking, suffocation, and drowning, he the said E. F. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D., in manner and form aforesaid, him the said E. F. feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

248. *For Murder, by secretly conveying Poison to the Deceased.*[1]

The jurors &c., upon their oath present, that C. D., of said B., yeoman, feloniously, wilfully, and of his malice aforethought, contriving and intending one E. F., with poison, feloniously, wilfully, and of his malice aforethought, to kill and murder, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, feloniously, wilfully, and of his malice aforethought, did privately and secretly convey into and leave a great quantity of white arsenic, being a deadly poison, in the lodging room of him the said E. F., in the dwelling-house of him the said E. F. there situate; and that the said C. D., contriving and intending as aforesaid, afterwards, to wit, on the day and year aforesaid, the same white arsenic, with a certain quantity of beer, in the same house then and there being, then and there feloniously, wilfully, and of his malice aforethought, did put, mix, and mingle, he the said C. D. then and there well knowing the said white arsenic to be a deadly poison; and also that the said beer, with which the said C. D. did so mix and mingle the said arsenic, was then and there prepared for the use of the said E. F.; and that the said E. F. afterwards, to wit, on the same day and year aforesaid, at B. aforesaid, did take, drink, and swallow down a great quantity of the said beer, with which

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[1] 3 Chitt. 774; see note (*d*); 2 Stark. 364; Cro. C. A. 293. This precedent appears to be defective in not sufficiently stating the *scienter* of the prisoner, that the beer and poison was prepared for the deceased. It is therefore added by the author.

the said white arsenic was mixed and mingled by the said C. D. as aforesaid, he the said E. F. not knowing that there was any white arsenic, or other poisonous ingredient, mixed or mingled with the said beer as aforesaid; by means whereof he the said E. F. then and there became sick and distempered in his body, and the said E. F., of the poison aforesaid, so by him taken, drank, and swallowed down as aforesaid, and of the sickness occasioned thereby, from the said day of in the year aforesaid, until the twenty-eighth day of said month, in the same year, at B. aforesaid, in the county aforesaid, did languish, and languishing did live; on which said twenty-eighth day of in the year aforesaid, at B. aforesaid, in the county aforesaid, he the said E. F., of the poison aforesaid, and of the sickness and distemper occasioned thereby, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that he the said C. D., in manner and form aforesaid, him the said E. F., feloniously, wilfully, and of his malice aforethought, did poison, kill, and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

249. *For Murder, by placing Poison so as to be mistaken for Medicine.*[1]

The jurors &c., upon their oath present, that C. D., of said B., laborer, feloniously, wilfully, and of his malice aforethought, devising and intending one E. F. to poison, kill, and murder, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, a certain quantity of arsenic, to wit, two drachms of arsenic, being a deadly poison, feloniously, wilfully, and of his malice aforethought, did put, infuse, mix, and mingle in and together, with water, he the said C. D. then and there well knowing the said arsenic to be a deadly poison; and that the said C. D. the said arsenic, so as aforesaid put, infused in, and mixed and mingled in and together with water, into a certain glass phial, did put and pour; and the said glass phial, with the said arsenic put, infused in, and mixed and mingled in and together with water as aforesaid contained therein, then and there, to wit, on the same day of in the year aforesaid, with force and arms, at B. aforesaid, feloniously, wilfully, and of his malice aforethought, in the lodging room of the said E. F. did put and place, in the place and stead of a certain sal-

[1] 3 Chitt. 774; Cro. C. A. 297–299; 2 Stark. 369.

utary medicine then lately before prescribed and made up for the said E. F., and to be taken by him the said E. F., he the said C. D. then and there feloniously, wilfully, and of his malice aforethought, intending that the said E. F. should drink and swallow down into his body the said arsenic, put, infused, mixed, and mingled in and together with water as aforesaid, contained in the said glass phial, by mistaking the same as and for the said salutary medicine, so prescribed and made up for the said E. F., and to be by him the said E. F. taken as aforesaid. And the jurors aforesaid, upon thir oath aforesaid, do further present, that the said E. F., not knowing the said arsenic, put, infused in, and mixed together with water as aforesaid, contained in the said glass phial, so put and placed by the said C. D., in the lodging room of the said E. F., in the place and stead of the said salutary medicine, then lately before prescribed and made up for the said E. F., to be taken by him the said E. F., in manner aforesaid, to be a deadly poison, but believing the same to be the true and real medicine, then lately before prescribed and made up for, and to be taken by him the said E. F., afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, the said arsenic, so as aforesaid put, infused in, and mixed together with water, by the said C. D., as aforesaid, contained in the said glass phial, so put and placed by the said C. D., in the lodging room of him the said E. F., in the place and stead of the said medicine, then lately before prescribed and made up for the said E. F., he the said E. F. did take, drink, and swallow down into his body; by means of which said taking, drinking, and swallowing down into the body of him the said E. F. of the said arsenic, so as aforesaid put, infused in, and mixed together with water by the said C. D. as aforesaid, he the said E. F. then and there became sick and distempered in his body; of which sickness and distemper of body, occasioned by the said taking, drinking, and swallowing down into the body of him the said E. F., and of the said arsenic, so as aforesaid put, infused in, and mixed together with water by the said C. D. as aforesaid, he the said E. F. on the said day of in the year aforesaid, at B. aforesaid, in the county aforesaid, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did poison, kill, and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

250. *For Murder by sending Poison.*[1]

The jurors &c., upon their oath present, that A. B., late of &c., of his malice aforethought, contriving and intending one C. D., with poison, feloniously to kill and murder, on with force and arms, at a large quantity of white arsenic, being a deadly poison, with a certain quantity of wine, feloniously, wilfully, and of his malice aforethought, did mix and mingle; he the said A. B. then and there well knowing the said white arsenic to be a deadly poison; and that the said A. B. afterwards, to wit, on the day of at aforesaid, the poison aforesaid, so as aforesaid mixed and mingled with the wine aforesaid, feloniously, wilfully, and of his malice aforethought, did send to her the said C. D. to take, drink, and swallow down; and that the said C. D., not knowing that the poison aforesaid in the wine aforesaid to have been mixed and mingled as aforesaid, afterwards, to wit, on at aforesaid, the said poison, so as aforesaid mixed and mingled, by the persuasion and procurement of the said A. B., did take, drink, and swallow down; and thereupon the said C. D., by the poison aforesaid, so mixed and mingled as aforesaid by the said A. B., and so taken, drank, and swallowed down as aforesaid, became then and there sick and distempered in her body, and the said C. D. of the poison aforesaid, and of the sickness and distemper occasioned thereby, from the said day of until the day of at aforesaid, in the county aforesaid, did languish, and languishing did live; on which said day of she the said C. D., at aforesaid, in the county aforesaid, of the poison aforesaid, and of the sickness and distemper thereby occasioned as aforesaid, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. her the said C. D., in manner and form, and by the means aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

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[1] 3 Chitt. 776. A person who procures another to administer poison who is ignorant of the nature of the mixture, is a principal in the first degree, though absent when administered.

251. *For Murder by Poisoning.*

The jurors &c., upon their oath present, that A. B., of &c., feloniously, wilfully, and of his malice aforethought, contriving and intending one C. D. with poison, feloniously, wilfully, and of his malice aforethought to kill and murder, on at feloniously, wilfully, and of his malice aforethought, a large quantity of deadly poison, called white arsenic, to wit, two drachms thereof, did put, mix, and mingle into, and with a certain quantity of beer, which the said C. D. then and there intended and was about to drink (the said A. B., then and there well knowing that the said C. D. intended, and was then and there about to drink the said beer, and the said A. B. then and there well knowing, that the said white arsenic, so as aforesaid by him put, mixed, and mingled into and with the said beer, to be a deadly poison,) and that the said C. D. afterwards, to wit, on the day of at did take, drink, and swallow down a great quantity, to wit, half a pint of the said beer with which the said white arsenic was so mixed and mingled by the said A. B. as aforesaid; he the said C. D. at the time of his so drinking and swallowing down the same, not knowing that there was white arsenic, or any other poisonous or hurtful ingredient mixed and mingled with the said beer; by means whereof, he the said C. D. then and there became sick and distempered in his body, and the said C. D. of the poison aforesaid, so by him taken, drank, and swallowed down as aforesaid, and of the sickness occasioned thereby, from the said day of in the year aforesaid, to the day of in the same year, at in the county aforesaid, did suffer and languish, and languishing did live; on which said day of in the year aforesaid, at B. aforesaid, in the county aforesaid, he the said C. D., of the poison aforesaid, and of the sickness and distemper occasioned thereby, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that he, the said A. B., in manner and form aforesaid, him the said C. D. feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

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[1] This precedent is taken from Archibald, p. 233, and is drawn with correctness and precision.

252. *For forcing the Deceased to drink Spirits to Excess.*[1]

The jurors &c., upon their oath present, that A. B., of &c., feloniously, wilfully, and of his malice aforethought, contriving and intending one C. D. feloniously, wilfully, and of his malice aforethought to kill and murder, on at in the county aforesaid, with force and arms, in and upon the said C. D., feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said A. B. then and there, wilfully, feloniously, and of his malice aforethought, did compel and force him the said C. D., then and there against his will, to take, drink, and swallow down a great quantity, to wit, three half pints of distilled spirituous liquor called brandy; and that the said C. D., by the compulsion and force aforesaid of him the said A. B., then and there against his will, did take, drink, and swallow down a great quantity of the said distilled spirituous liquor called brandy, to wit, the quantity of three half pints; by reason of which said drinking and swallowing down of the said three half pints of said brandy in manner aforesaid, by the compulsion aforesaid, and against the will of him the said C. D., he the said C. D. then and there became suffocated and choked; of which said suffocation and choking he the said C. D. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., him the said C. D. then and there, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

253. *By forcing a sick Person into the Street.*[2]

The jurors &c., upon their oath present, that A. B., of &c., intending one C. D. feloniously, wilfully, and of his malice aforethought, to kill and murder, on at with force and arms, at an unseasonable hour in the night, to wit, about the hour of eleven in the night of the same day, in and upon the said C. D., he the said C. D. then and there being in extreme sickness and weakness of body, occasioned by a fever, and then

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[1] 3 Chitt. 770.

[2] 3 Chitt. 771. This will be murder upon the principle of the case of the inhuman son, who carried about his sick father in inclement weather till he died. 1 Hale, 431. There is no precedent for this species of murder, *viz.*, that of exposing a sick father, in Tremaine, Cro C. C., Cro. C. A., Chitty, or Starkie.

and there confined to his bed in the dwelling-house of him the said A. B. there situate, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said A. B. him the said C. D. from and out of the said bed, and also out of the said dwelling-house, into the public and open street there, did then and there feloniously, wilfully, and of his malice aforethought, remove, force, and drive, and there abandon and leave; he the said A. B. then and there well knowing the said C. D. to be then in extreme sickness and weakness of body, occasioned by the fever aforesaid; by means whereof, he the said C. D., through the cold and the inclemency of the weather, and for want of due care and other necessaries requisite for a person in such sickness and weakness as aforesaid, then and there died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., him the said C. D., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder; against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

254. *By confining and starving an Apprentice.*[1]

The jurors &c., upon their oath present, that A. B., of &c., contriving and intending, of his malice aforethought, one C. D. then being an apprentice to him the said A. B., feloniously, wilfully, and of his malice aforethought to starve, kill, and murder, on at and on divers days and times between that day and the day of &c., in and upon the said C. D. his apprentice aforesaid, then and there feloniously, wilfully, and of his malice aforethought did make divers assaults, and that the said A. B. afterwards, to wit, on the said day of and continually from thence until the day of at feloniously, wilfully, and of his malice aforethought, did keep, confine, and imprison him the said C. D. in a certain cellar, part and parcel of a certain dwelling-house there situate and being, and during all that time did feloniously, wilfully, and of his malice aforethought, neglect and refuse to give and administer, or permit to be given or administered to him the said C. D. being so confined and imprisoned as aforesaid, sufficient meat, drink, victuals, and other necessaries, as were proper and requisite for the sustenance, support, and maintenance of the body of

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[1] Chitt. 778; Cro. C. A. 464; and Stark. 372, for confining and starving a wife.

him the said C. D.; by means of which said confinement and imprisonment, and also for want of sufficient meat, drink, victuals, and other necessaries, as were proper and requisite for the sustenance, support, and maintenance of the body of him the said C. D., he the said C. D. from the said day of until and to the said day of in the said cellar, at aforesaid, in the county aforesaid, did linger and pine, and became greatly emaciated and consumed in his body, and during all that time did suffer and languish, and languishing did live; on which said day of he the said C. D., at aforesaid, in the county aforesaid, of such confinement and imprisonment, and for want of such sufficient meat, drink, victuals, and other necessaries as were proper and requisite, for the sustenance, support, and maintenance of his body, did miserably perish and die. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. him the said C. D. in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

255. *Against a Woman for drowning her own Child.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on with force and arms, at in and upon one C. D., the daughter of her the said A. B., she the said C. D. being an infant of tender age, to wit, of the age of one year, feloniously, wilfully, and of her malice aforethought, did make an assault; and that the said A. B. then and there wilfully, feloniously, and of her malice aforethought, did take the said C. D. into both of her hands, and did then and there wilfully, feloniously, and of her malice aforethought, cast, throw, and push the said C. D. into a certain pond there situate, in which there was a great quantity of water; by means of which casting, throwing, and pushing of the said C. D. into the pond aforesaid, by the said A. B. in form aforesaid, she the said C. D. in the pond aforesaid, with the water aforesaid was then and there choked, suffocated, and drowned; of which said choking, suffocation, and drowning, she the said C. D. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that she the said A. B. her the said C. D., then and there in manner and form aforesaid, wilfully, feloniously, and of her malice afore-

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[1] 3 Chitt. 770; Stark. 373.

thought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

256. *For Murder with a Bludgeon.*

The jurors &c., upon their oath present, that John Francis Knapp, of Salem, in the county of Essex aforesaid, mariner, on the sixth day of April, in the year of our Lord one thousand eight hundred and thirty, with force and arms, at Salem aforesaid, in the county aforesaid, in and upon one Joseph White, feloniously, wilfully, and of his malice aforethought, did make an assault; and that he the said John Francis Knapp, with a certain deadly weapon made of hard wood and loaded with lead in the head thereof, called a bludgeon, which he the said John Francis Knapp in his right hand then and there had and held, the aforesaid Joseph White, in and upon the left side of the forehead over the left temple of him the said Joseph White, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, wound, and fracture, giving to the said Joseph White then and there with the bludgeon aforesaid, in and upon the left side of the forehead, over the left temple of him the said Joseph White, one mortal wound of the length of three inches, and of the width and depth of two inches; of which said mortal wound the aforesaid Joseph White then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said John Francis Knapp the aforesaid Joseph White then and there in manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

NUISANCE.

257. *For erecting a Soap Manufactory near a Highway and Dwelling-House.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at near to a public street, and common highway there, and also near to the dwelling-houses of divers citizens there situate and being, did unlawfully and injuriously erect and build, and cause and procure to be erected and built, a certain building for the purpose of making and manufacturing soap therein, and did unlawfully and injuriously make, set up, and place, and did cause and procure to be made, set up, and placed in the said building, divers furnaces, stoves, cauldrons, coppers, and boilers, to wit, [*here insert the number of each,*] for the purpose of boiling, melting, and mixing tallow, soap-lees, and other materials used in the making and manufacturing of soap; and that the said A. B. did, on the day and year aforesaid, and on divers other days and times between that day, and the day of the taking of this inquisition, at &c., unlawfully and injuriously boil, melt, and mix together, and did cause and procure to be boiled, melted, and mixed together in the said furnaces, stoves, cauldrons, and boilers respectively, so made, set up, and placed in the said building as aforesaid, divers large quantities of tallow, soap-lees, and other materials used in the making and manufacturing of soap, for the purpose of making and manufacturing the same into soap; and did then and there make and manufacture, and did cause and procure to be made and manufactured, divers large quantities of soap from the same tallow, soap-lees, and other materials; by reason of which said premises, divers noisome and unwholesome smokes, vapours, smells, and stenches, on the days and times aforesaid, were emitted and issued from the said building, so that the air, on the several days and times aforesaid, at &c., was thereby greatly filled and impregnated with the said smokes, vapours, smells, and stenches, and was rendered and became, and was corrupted, offensive, and unwholesome; to the great damage and common nuisance of all the citizens of said Commonwealth, there inhabiting, being, and residing, and going, returning, and passing through the said street and common highway aforesaid, and against the peace and dignity of said Commonwealth.

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[1] 2 Stark. 657; 2 Chitt. 654, 655. Add, if necessary, another count for continuing the building, &c.; for a precedent for this, see 2 Stark. 658.

258. *For mixing Lees, and boiling Tallow, Soap, &c.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at and near the dwelling-houses of divers citizens of said Commonwealth there situate, and also near to divers public streets, being common highways there, divers large quantities of tallow, oil, lime, potashes, soap-lees, and other noisome and offensive materials, did boil, melt, and mix together, and did cause to be boiled, melted, and mixed together; by means whereof, divers noisome, noxious, and unwholesome smokes, vapours, smells, and stenches, on the days and times aforesaid, at aforesaid, were emitted and issued from the said tallow, oil, soap-lees, and other materials, so boiled, melted, and mixed together as aforesaid; and the air there, on the days and times aforesaid, was thereby greatly filled and impregnated with the said smokes, vapours, smells, and stenches; and was thereby rendered, and then and there became and was greatly corrupted, offensive, and unwholesome, to the great injury and common nuisance of all the citizens of said Commonwealth, there inhabiting, being, and residing, and going, returning, and passing through the said streets and common highways aforesaid; against the peace and dignity of said Commonwealth, and contrary to the form of the statute in such case made and provided.

259. *For keeping Hogs near a public Street.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on and on divers other days and times between that day, and the day of the taking of this inquisition, at near the dwelling-houses of divers citizens of said Commonwealth, and also near divers public streets and common highways there, did, and yet doth keep (ten) hogs; and the said hogs, then and there, and on the said other days and times, at unlawfully and injuriously did feed, and yet doth feed, with offal and entrails of beasts, and other filth; by reason whereof, divers noisome and unwholesome smells and stenches, during the time aforesaid, did from thence there arise, and the air there was, and yet is, thereby

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[1] 2 Stark. 659.

[2] 2 Stark. 659, where it is said "this is an offence at common law." 2 Ld. Raym. 1163; 2 Chitt. 647; Cro. C. C. 492, (6th Ed.) See other precedents in 2 Stark. 660, and 2 Chitt. 648, 649, for erecting a furnace for boiling the offal of beasts, for boiling bullocks' blood, and against a butcher for using his shop as a slaughter-house in a public market.

greatly corrupted and infected; to the great damage and common nuisance not only of all the citizens of said Commonwealth there resident and dwelling, but also of all other citizens thereof, passing and repassing in, by, and through the said streets and common highways there, and against the peace and dignity of the Commonwealth aforesaid.

260. *For erecting Obstructions on a Navigable River.*[1]

The jurors &c., upon their oath present, that a certain part of the river situate and being between and and also wholly situate and being in the said county of is, and from time whereof the memory of man is not to the contrary, hath been, an ancient river, and an ancient and common highway[2] for all the citizens of said Commonwealth, with their ships, lighters, boats, and other vessels, to navigate, sail, row, pass, and repass, and labor at their will and pleasure, without any impediment or obstruction whatever. And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., late of in the said county of fisherman, on and on divers other days and times between that day and the day of the taking of this inquisition, at in the said county of unlawfully, wilfully, and injuriously, did erect, place, fix, put, and set in the said river, and ancient and common highway there, a certain [*here describe the obstruction according to the fact;*] and that the said A. B., from the day and year first aforesaid, hitherto, at aforesaid, the said unlawfully, wilfully, and injuriously, hath continued, and still doth continue, so erected, placed, fixed, put, and set in the said river and ancient and common highway aforesaid; by means whereof the navigation and free passage of, in, through, along, and upon the said river and ancient and common highway there, on the same day and year aforesaid, and from thence hitherto hath been, and still is greatly obstructed, straitened, and confined; so that the citizens of said Commonwealth, navigating, sailing, rowing, passing, repassing, and laboring with their ships, lighters, boats, and other vessels, in, through, along, and upon the said river and ancient and common highway there, on the same day and year aforesaid, and from thence hitherto, could not nor yet can navigate, sail, row, pass, repass, and labor, with their ships, lighters, boats, and other vessels, upon and about their

[1] 2 Stark. 661.

[2] A river common to all is properly termed a highway. 1 Hawk. c. 76, § 1.

lawful and necessary business, affairs, and occasions, in, through, along, and upon the said river and ancient and common highway there, in so free and uninterrupted a manner, as of right they ought, and before have been used and accustomed to do; to the great damage and common nuisance of all the citizens of said Commonwealth, navigating, sailing, rowing, passing, repassing, and laboring with their ships, boats, lighters, and other vessels in, through, along, and upon the said river and the ancient and common highway there; to the great obstruction of the trade and navigation of and upon the said river, and against the peace and dignity of the Commonwealth aforesaid.

261. *For obstructing a public Street by leaving empty Drays in it.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on and on divers other days and times between that day and the day of taking this inquisition, at in a certain street and common highway there, called used for all the citizens of said Commonwealth, with their horses, carriages, and carts, to go, return, ride, pass, repass, and labor at their free will and pleasure, unlawfully and injuriously did put and place three empty drays, and did then, and on the said other days and times there, unlawfully and injuriously permit and suffer the said empty drays respectively to be and remain in the street and common highway aforesaid, for the space of three hours, on each of the said days, whereby the street and common highway aforesaid, then, and on the said other days, for and during all the said times on each of those days respectively, was obstructed and straitened; by reason whereof, the citizens of the said Commonwealth, during the days and times aforesaid, could not go, return, pass, repass, ride, and labor, with their horses, carts, and carriages, in, by, and through the same street and highway aforesaid, as they were wont and ought to do, without danger and peril of their lives; to the great injury and common nuisance of all the citizens of said Commonwealth, going, returning, passing, repassing, riding, and laboring in, by, and through the same street and highway; against the peace and dignity of the Commonwealth aforesaid.

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[1] 2 Stark. 665.

262. *Against the Inhabitants of a Town for not repairing a Highway.*[1]

The jurors &c., upon their oath present, that on there was[2] and from thence hitherto hath been, and still is, a public road and common highway, in the town of in the county aforesaid, leading from in the said town of to in the same town, for all the citizens of said Commonwealth, with their horses, teams, carts, and carriages, to go, return, pass, repass, ride, and labor, at their free will and pleasure; and that the aforesaid public road and common highway situated as aforesaid, in the said town of on was, and from thence until the day of the taking of this inquisition, hath been, and still is, out of repair, ruinous, miry, broken, and incumbered with rocks and stones, so as to be inconvenient and dangerous to the lives and safety of the citizens of this Commonwealth, having occasion to pass and repass, ride and labor upon the public highway and common road aforesaid, with their horses, teams, carts, and carriages; and that the inhabitants of the said town of in their corporate capacity, are bound and obliged by the laws of this Commonwealth, to keep and maintain the public road and common way aforesaid, in safe, convenient, and complete repair; yet the said inhabitants, during all the days and times aforesaid, at aforesaid, have, and still do, neglect and refuse to keep the said public road and common highway in such repair; to the great injury and common nuisance of all the citizens of said Commonwealth, having occasion to pass, repass, and labor upon the road aforesaid, with their horses, teams, carts, and carriages; against the peace and dignity of said Commonwealth, and contrary to the form of the statute in such case made and provided.[3]

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[1] Altered from 2 Stark. 667, and made conformable to the precedents used in Massachusetts.

[2] In the older precedents it is stated, "from time whereof," &c. but this is unnecessary. 2 Stark. 667, note (*c.*) quotes 3 T. R. 265; 2 Saund. 158, b. n. 4. See the other explanatory notes in 2 Stark. 667, 668.

[3] The repair of public roads in Massachusetts is provided for by statute of 1786, c. 81. If there be bridges or causeys on the road complained of, the fact may be alleged in the indictment thus: "and the several bridges &c., situated on the same road," &c. are out of repair, &c.

263. *For laying Rubbish in a Street, whereby a Carriage was overturned.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at in a certain public street and common highway there, called Court Street, did unlawfully and injuriously, put, place, and lay, and cause and procure to be put, placed, and laid, a large quantity of bricks, to wit, (three cart-loads of bricks,) [*state the incumbrance according to the fact,*] and the said bricks, in the said street and common highway there, from the said day of until the day of the taking of this inquisition, unlawfully and injuriously did continue, and still doth continue, without any inclosure or fence whatever, and without any light hung out or placed in the night time, to prevent the injury and damage that might happen to the citizens of said Commonwealth, with their horses, carts, and carriages, passing and repassing through the said street and common highway; whereby the citizens of said Commonwealth could not, during the time last aforesaid, pass and repass through and along the said street and common highway without great danger of their lives.

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[1] See Cro. C. A. 249. This precedent is there said to have been found and determined in the Court of King's Bench. See also a similar precedent in 2 Chitt. 622, 623, cites Cro. C. C. 315, (8th Ed.) See note, 2 Chitt. 607 – 610. It is there stated that every unauthorized obstruction to a highway, to the annoyance of the people, is an indictable offence. Per Ld. *Ellenborough*, 3 Camp. 227. As where a wagoner constantly suffers wagons to stand on the side of the highway on which his premises are situate, an unreasonable time, he is guilty of a nuisance, 6 East, 422. And if stage-coaches regularly stand in a public street, though for the accommodation of passengers, so as to obstruct the regular track of carriages, the proprietor may be indicted. 3 Campb. 224. So laying and cutting logs of wood or timber in the street, which he could not otherwise convey into his premises, will not be excused by the necessity which he himself created. 2 Campb. 230. It is even said that "if coaches on the occasion of a rout, wait an unreasonable time in the public street, and obstruct the transit of those who wish to pass in carriages or on foot, the persons who cause such carriages so to wait are guilty of a nuisance." 3 Campb. 226. A mere transitory obstruction, which must necessarily occur, is excusable; such as erecting a scaffold for repairing a house; the unloading of a cart or wagon, and the delivery of large articles, such as casks of liquor, if done with as little delay as possible, are lawful; though if an unreasonable time were employed in the operation, they would become nuisances. 3 Campb. 231. Independently of any legal proceedings, any person may lawfully abate a public nuisance, if it obstruct the passage of the people.

And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on about the hour of ten in the night of the same day, at aforesaid, in the county aforesaid, one C. D. was driving a certain carriage and horses through and along the said street and common highway; and that the said C. D., in so passing through the said street and common highway, with the said carriage and horses, was then and there, by means of the bricks so put, placed, and laid as aforesaid, overturned and prostrated; then and there having within said carriage one E. F., in which carriage the said E. F. then and there was; and that the said E. F. was then and there so greatly bruised, hurt, and wounded by being overturned, prostrated, and thrown out of the said carriage in manner aforesaid, that he the said E. F. afterwards, to wit, on the day of at in the year aforesaid, of such hurts, bruises, and wounds, died; to the great damage and common nuisance of all the citizens of said Commonwealth, going, returning, passing, and repassing with their horses and carriages in, by, and through the public street and common highway aforesaid, during the time aforesaid, and against the peace and dignity of the Commonwealth aforesaid.

264. *For erecting a Building on a common Highway.*[1]

The jurors &c., upon their oath present, that there is now, and long before, and at the time of the obstruction and nuisance hereinafter mentioned, there was a common and public highway in the town of B., in the county aforesaid, leading from [*here describe the way*,] for all the citizens of the said Commonwealth to go, return, pass, and repass in and along the same, at their will and pleasure. And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., of yeoman, on the day of at B. aforesaid, in the county aforesaid, did unlawfully and injuriously erect and build, and cause to be erected and built, a part of a certain edifice and building in and upon a certain part of the common and public highway aforesaid, to wit, square feet of the same common and public highway; and the said part of said edifice and building so as aforesaid erected and built in and upon the said part of the common and public highway aforesaid, he the said A. B., from the said day of until the day of the finding of this bill, un-

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[1] See 2 Chitt. 612, note (*f.*) This indictment was framed by a very eminent pleader.

lawfully and injuriously did continue, keep up, and maintain; whereby the said common and public highway hath been, for and during all the time aforesaid, and still is, greatly narrowed, obstructed, and stopped up, so that the citizens of said Commonwealth could not, during the time aforesaid, nor can they now, go, return, pass, and repass in and upon the common and public highway aforesaid, as they were before used and accustomed, and still of right ought to do; to the great damage and common nuisance of all the citizens of said Commonwealth, in the common and public highway aforesaid going, returning, passing, and repassing, and against the peace and dignity of the Commonwealth aforesaid.

265. *For keeping a disorderly House.*[1]

The jurors &c., upon their oath present, that A. B., of &c., laborer, on the day of and on divers other days and times between that day and the day of taking this inquisition, at a certain common, ill-governed, and disorderly house unlawfully did keep and maintain; and in the said house, for his own lucre and gain, certain evil disposed persons, as well men as women, of evil name, fame, and conversation, to come together on the days and times aforesaid, there unlawfully and willingly did cause and procure; and the said persons, in the said house, at unlawful times, as well in the night as the day, on the days and times aforesaid, there to be and remain, drinking, tipling, cursing, swearing, quarrelling, and otherwise misbehaving themselves, unlawfully did permit and suffer; to the great injury and common nuisance of all the peaceable citizens of said Commonwealth there residing, inhabiting, and passing, and against the peace and dignity of the Commonwealth aforesaid.

266. *For keeping a common Bawdy House.*[2]

The jurors &c., upon their oath present, that A. B., of &c., laborer, on the day of and on divers other days and

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[1] See 2 Chitt. 41, for a precedent for bathing publicly, near to public ways, and habitations.

[2] 2 Chitt. 40; Cro. C. C. 302, (8th Ed.) See note (*b.*) 2 Chitt. 40, where it is said that this is the common printed form used in England. It is not necessary to state particulars; as the names of those who frequented the house. 2 Burr. 1232; 1 T. R. 752 – 754. But evidence of particular instances of illicit intercourse may be given in evidence under the general charge. If the person be only a lodger and make use of her room for disorderly purposes, she would be

times as well before as afterwards, to the day of taking this inquisition, at B. aforesaid, in the county aforesaid, a certain common house of ill fame, unlawfully and wickedly did keep and maintain; and the said house, for the sake of lucre and gain, divers evil disposed persons, as well men as women, and common prostitutes, on the days and times aforesaid, as well in the night as in the day, there unlawfully and wickedly did receive and entertain; and in which house the said evil disposed persons and common prostitutes, by the consent and procurement of the said A. B., on the days and times aforesaid, there did commit whoredom and fornication: whereby divers unlawful assemblies, riots, affrays, disturbances, and violations of the peace of the said Commonwealth, and lewd offences, in the same house, on the days and times aforesaid, as well in the night as in the day, were there committed and perpetrated; to the great damage and common nuisance of all the citizens of said Commonwealth, in manifest destruction and subversion of, and against good morals and good manners, and against the peace and dignity of the Commonwealth aforesaid.

FALSE PERSONATING.

267. *Form of Indictment for personating the Proprietor of Consolidated Bank Annuities, and transferring the same.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at was possessed of, and entitled to, a certain transferable share, to wit, [*here state the facts relative to the an-*

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guilty of keeping a bawdy house. In 1 Salk. 384, it was decided that a wife, as well as a husband, may be indicted for keeping a bawdy house, because the charge does not respect the *ownership*, but the *criminal management* of the house. St. 1793. c. 59. s. 8.

[1] 4 Went. 55; 1 Leach, 434, 435, abstract of an indictment; 3 Chitt. 1085; also 1083, another precedent, all of which are upon British statutes. This offence has been considered and treated as a conspiracy. 2 Russ. 1658; 2 East P. C. c. 20, § 6, p. 1010, and nearly allied to forgery. *Renouard* v. *Noble*, 2 Johns. Cases, 293; Ingersol's Digest, 153; Gord. Digest, art. 3626; act of the United States of March 3, 1925, § 18, 19. Is it not a cheat by false pretences, and indictable as such upon the statute for punishing them?

nuities :] the proprietors of which said annuities so as aforesaid established, then, to wit, on &c., had in respect of said annuities, transferable shares in the capital stock of said annuities in proportion to their respective annuities; and that he the said A. B., on the said day of was the true and real proprietor of a share in the said annuities; and in respect thereof, then and there had the said transfering share before mentioned, of and in the said capital stock of the said annuities. And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D., late of &c., well knowing the premises, but wickedly devising and intending the bank of &c. to defraud, afterwards, to wit, on at aforesaid, falsely, deceitfully, and fraudulently did personate the said A. B., the true and real proprietor of said share, of and in the said capital stock of said annuities: and thereby did falsely and fraudulently transfer the said share of said A. B. &c., of and in the said capital stock of the said annuities, unto one E. F., as if he the said E. F. then was the true and lawful owner of the said share, and of and in the said capital stock of the said annuities; against the peace and dignity of the Commonwealth aforesaid.

PERJURY AND SUBORNATION OF PERJURY.

268. *For Perjury in an Affidavit to hold to Bail, in falsely swearing to a Debt.*[1]

The jurors &c., upon their oath present, that A. B., of &c., wickedly and maliciously contriving and intending one C. D. unlawfully to aggrieve and oppress, and the said C. D. to great expense of his moneys, wickedly and maliciously to put and bring; and also to cause the sum of to be endorsed upon a process of the court of by virtue of which the said C. D. might be arrested to answer in the same court, at the suit of E. F., with intent that the said C. D. should be compelled to find bail for the aforesaid sum of on at came in his proper person before G. H., Esquire, then being one of the justices of said court; and then and there in due form of law

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[1] 2 Chitt. 323, 324; Cro. C. C. 538, (6th Ed.)

was sworn, and did take his oath before the said G. H. Esquire, one of the justices of the said court as aforesaid, (he the said G. H. then and there having sufficient and competent authority and power to administer an oath to the said C. D. in that behalf;) and that the said C. D., being so sworn as aforesaid, then and there, before the said G. H. Esq., upon his oath aforesaid, falsely, wickedly, wilfully, and corruptly, did say, depose, swear, and make affidavit in writing, (among other things,) in substance and to the effect following: that is to say, [*here insert that part of the affidavit that is false*;] as by the same affidavit now filed in the court aforesaid, more fully appears; whereas in truth and in fact, the said C. D. [*here negative the facts alleged as false.*] And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D., in manner and form aforesaid, did commit wilful and corrupt perjury, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

269. *For Perjury, by a Witness, on the Trial of an Issue in the Supreme Judicial Court.*[1]

The jurors &c., upon their oath present, that heretofore, to wit, at the Supreme Judicial Court, begun and holden at B., within and for the county of S., before the Hon. I. P., Esq., then being Chief Justice[2] of the Supreme Judicial Court, on the Tuesday of in the year of our Lord one thousand eight hundred and twenty-two, in the said court, amongst the pleas of the said term, a certain issue was duly joined in the said court, between C. D. the plaintiff, and E. F. the defendant, in a certain action of trespass for assault and battery and false imprisonment; which action before that time had been commenced between the parties in that behalf, and was then pending in the Supreme Judicial Court aforesaid; and that afterwards, to wit, at the sitting of said court, before I. P., Esq., Chief Justice thereof, the same issue came on to be tried, and then and there was tried, in due form of law, by a jury of the said county of S., in that behalf duly impannelled and sworn between the said parties; and that, upon the trial of the said issue, one G. H., late of in the county of laborer, did then and there, to wit, on the

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[1] 2 Stark. 521.

[2] If any other of the justices of the Supreme Court preside at the trial, his name must be inserted, and the oath alleged to be administered by him, in the same manner as is here alleged as to the Chief Justice.

day of in the year aforesaid, at B. aforesaid, in the county of S. aforesaid, appear, and was produced as a witness for and on behalf of said C. D. the plaintiff, and that the said G. H. was sworn, and did then and there take his corporal oath before the said I. P., Chief Justice as aforesaid, that the evidence which he should give to the said court and jury, touching the matters in question on the said issue, should be the truth, the whole truth, and nothing but the truth; the said I. P., Esq., Chief Justice as aforesaid, then and there having sufficient and competent power and authority to administer the said oath to the said G. H. in that behalf; and then and there, upon the trial of said issue, it became and was a material question, whether the said E. F. had struck the said C. D., or had dragged him by the hair of his head; and that thereupon the said G. H., being so produced and sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, devising and wickedly intending to cause a verdict to pass against the said E. F. and for the said C. D., on the trial of said issue, did then and there, before the said I. P., Esq., the Chief Justice as aforesaid, and the said jury sworn as aforesaid to try the said issue, falsely, maliciously, wilfully, and corruptly, and by his own proper act and consent, depose, swear, and give evidence on the trial aforesaid, amongst other things, before the said I. P., Esq., Chief Justice as aforesaid, and to the jurors of the said jury, so sworn between the parties aforesaid, in substance as follows, [*here set forth the false testimony, with proper inuendoes;*] whereas in truth and in fact, [*here negative the false testimony.*] And so the jurors aforesaid, upon their oath aforesaid, do say, that the said G. H., in manner and form aforesaid, and of his own most corrupt mind, did falsely, wickedly, wilfully, and corruptly commit wilful and corrupt perjury; to the manifest perversion of public justice, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

270. *For Perjury, in an Answer sworn to before a Master in Chancery.*[1]

The jurors &c., upon their oath present, that C. D., of &c., heretofore, to wit, on &c., at &c., did exhibit his bill of complaint, in writing, against one E. F. therein described, of said B., yeoman, in the Supreme Judicial Court of this Common-

[1] 2 Stark. 524; 2 Chitt. 411.

wealth, begun and held at W., within and for the county of W., on the Tuesday of in the year of &c.; and the said C. D., in and by his said bill of complaint, among other things, stated and alleged, in substance, and to the effect following, to wit, [*here insert that part of the bill, concerning which the perjury was committed,*] as in and by the said bill of complaint of the said C. D. remaining filed of record, in the said Supreme Judicial Court, amongst other things, more fully appears. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. F. the defendant, in the said bill of complaint, afterwards, that is to say, on the day of &c., at said B., in the county of S., did come, in his own proper person, before G. H., Esq., then and there being one of the masters in chancery of the said Supreme Judicial Court, and then and there did exhibit and produce to the said G. H., Esq., the answer in writing of him the said E. F. to the said bill of complaint of the said C. D., entitled, "The answer of E. F., the defendant, to the bill of complaint of C. D., complainant;" and the said E. F. was then and there sworn in due form of law, and took his corporal oath, touching and concerning the matters contained in his said answer by and before the said G. H., Esq., he the said G. H. so then being one of the masters in chancery in the said Supreme Judicial Court, and then and there having sufficient and competent power and authority to administer an oath to the said E. F. in that behalf; and that the said E. F., being so sworn as aforesaid, and being then and there lawfully required to declare and depose the truth in a proceeding in a course of justice, did, upon his oath aforesaid, concerning the matters contained in his said answer, before the said G. H. Esq., then as aforesaid being one of the masters in chancery of the said Supreme Judicial Court, then and there swear, that so much of the said answer of him the said E. F. as related to his own acts and deeds was true; and that the said E. F., being so sworn as aforesaid, intending unjustly to aggrieve the said C. D., the said complainant as aforesaid, in his answer aforesaid, before the said G. H., Esq., he being then as aforesaid one of the masters in chancery in the said Supreme Judicial Court, (and having sufficient and competent authority as aforesaid,) falsely, knowingly, wilfully, and corruptly, by his own act and consent, upon his oath aforesaid, did answer, swear, and affirm, amongst other things, in substance as follows, that is to say, " and this defendant (meaning himself the said E. F.) says," [*here insert verbatim that part of the answer, relative to and comprising the part in which the perjury is alleged to have been committed,*] as by the said answer of him

the said E. F. still remaining in the Supreme Judicial Court aforesaid, at B. aforesaid, in the county of S. aforesaid, amongst other things will appear; whereas in truth and in fact, [*then go on to negative the answer in the words of it, and in every part of it which is alleged to be false.*] And so the jurors aforesaid, upon their oath aforesaid, do say, that the said E. F. falsely and wickedly, wilfully and corruptly, in manner and form aforesaid, did commit wilful and corrupt perjury, to the great damage of him the said C. D.; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

271. *For Perjury, in Answer to Interrogatories exhibited in Chancery.*[1]

The jurors &c., upon their oath present, that one C. D. heretofore, to wit, on did exhibit certain interrogatories, in writing, in the Supreme Judicial Court of this Commonwealth, begun and holden at B., within and for the county of S., on the Tuesday of in the year of &c., in a certain case before that time commenced by bill of complaint, and then pending and at issue in the same court, after certain pleadings and proceedings had been had therein; in which said suit one E. F. was complainant, and the said C. D. was respondent, in order that the said interrogatories might be administered, according to the course and practice of the said court in its chancery jurisdiction, to certain witnesses to be produced, sworn, and examined in the said cause, on the part and behalf of the said C. D., the said defendant therein, touching and concerning a certain written paper, purporting to contain an agreement for the lease of a certain house and premises therein mentioned, from the said E. F. to the said C. D.; and that it became and was a material question in the said cause between the said parties, and to be deposed to by the said witnesses in answer to the said interrogatories, whether the said E. F. had declared that he would release the said C. D. from the said agreement, or had released him from the performance thereof; and in and by one of the interrogatories, exhibited as aforesaid, the said witnesses were interrogated as follows, that is to say, [*here copy the interrogatories with necessary innuendoes.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that G. H. of in the county of yeoman, and one of the witnesses to

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[1] 2 Chitt. 397 – 399; 4 Went. 292.

whom the interrogatories in the said cause were to be, and were accordingly, afterwards, to wit, on at administered, then and there came in his own proper person before the said Supreme Judicial Court, and having seen and understood the said interrogatories, so exhibited in the said court as aforesaid, then and there, before I. P., Esq , Chief Justice of the said Supreme Judicial Court, he the said I. P., Esq., as Chief Justice as aforesaid, then and there having sufficient and competent power and authority to administer an oath to the said G. H. in that behalf, was duly sworn before the said court by the said I. P., Esq., Chief Justice as aforesaid; and the said G. H. then and there, on his said oath before the said court, being then and there required to depose the truth in a proceeding in a course of justice, did swear, that he would make true answers to all such questions as should be asked him by the said court or their order, upon the interrogatories aforesaid, at the time of his examination, and that he would speak the truth, the whole truth, and nothing but the truth, without favor or affection to the said parties in the said cause; and that the said G. H. afterwards, to wit, on the day of was duly examined in the said court upon the said interrogatories; and that the said G. H. intending unjustly to aggrieve the said E. F., the complainant aforesaid, did then and there, in his answer to the said fourth interrogatory, falsely, knowingly, wilfully, and corruptly, by his own act and consent, amongst other things, answer, swear, and affirm, in writing, as follows, that is to say, [*here state the answer with necessary inuendoes;*] as by the said answer of the said G. H. to the said fourth interrogatory remaining filed in the court aforesaid, will, amongst other things, fully appear; whereas in truth and in fact, [*then go on to negative the answer in all its parts, comprehending what is alleged to be false.*] And so the jurors aforesaid, upon their oath aforesaid, do say, that the said G. H., then and there, knowingly, wickedly, falsely, wilfully, and corruptly, in manner and form aforesaid, did commit wilful and corrupt perjury; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

272. *For Perjury, by a Bankrupt, in his Examination before the Commissioners in the Circuit Court of the United States.*[1]

The jurors &c., upon their oath present, that heretofore, to wit, on the day of in the year of our Lord one thousand eight hundred and three, a certain commission of bankruptcy, bearing date the same day and year aforesaid, founded upon the act of the Congress of the United States, entitled "An act to establish a uniform system of bankruptcy throughout the United States," was duly awarded and issued under the hand and seal of the Honorable Richard Peters, judge of the District Court of the United States for the Pennsylvania District, against C. D., usually residing in the city of Philadelphia, in the said Pennsylvania District, using and exercising the trade and business of merchandise and tin manufacturer, and directed to Mahlon Dickerson, Thomas Cumpston, and John Sargent, Esqrs., (being three of the general commissioners of bankruptcy, duly appointed by the President of the said United States in the said Pennsylvania District,) and the said C. D. was thereupon, in due form of law, found, declared, and adjudged to be a bankrupt; and that the said C. D., being so as aforesaid found, declared, and adjudged to be a bankrupt, was in due form of law summoned and required to surrender himself to the said commissioners in the said commission named, or the major part of them, at their office, [*naming the place of it*,] to be examined, and to make a full and true discovery and disclosure of the estate and effects according to the directions of the act of Congress aforesaid, in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. D. did surrender himself to the said commissioners, or a major part of them, and did sign and subscribe such surrender, and submit to be examined from time to time, by and before the said commissioners, or the major part of them, touching and concerning his estate and effects, according to the directions of the act of Congress aforesaid; and that the said C. D., on the day of at the office of said commissioners, they the said commissioners being authorized to take the examination of the said C. D. as aforesaid, in order that he the said C. D. should make a full and true disclosure and discovery of his estate and effects, agreeably to the directions of

[1] 2 Chitt. 405.

the act of Congress aforesaid, and then and there, by and before said commissioners, was duly sworn and took his corporal oath to make a full and true discovery and disclosure of his estate and effects aforesaid, (they the said Mahlon Dickerson, Thomas Cumpston, and John Sargent then and there having sufficient and competent authority to administer said oath to the said C. D. in that behalf;) and that the said C. D. being so sworn as aforesaid, not regarding the act of Congress aforesaid, nor the punishment therein provided for wilful and corrupt perjury, but fraudulently and wickedly devising to avoid and suppress a full and true discovery of his estate and effects, and to subvert the truth, then and there, to wit, on the said day of in the year aforesaid, at the office of the commissioners aforesaid, in and upon his examination aforesaid, in answer to an interrogatory then and there duly put and administered to him the said C. D. in substance and to the following effect; that is to say, [*here insert the interrogatory verbatim, as put to the said C. D.*,] did falsely, corruptly, knowingly, and wilfully depose and swear in substance and to the effect following, that is to say, [*here insert the false answer;*] whereas in truth and in fact, the said C. D. did not [*here negative the answer in all that is false.*] And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D., in manner and form aforesaid, upon his oath aforesaid, by his own act and consent, and of his own wicked and corrupt mind, did commit wilful and corrupt perjury; against the peace and dignity of the said United States, and contrary to the form of the act of the Congress of the United States in such case made and provided.

273. *For Perjury, in a Complaint before a Magistrate.*

The jurors &c., upon their oath present, that heretofore, to wit, on the day of &c., at &c., one C. D. went before E. F., Esq., one of the justices of the peace in and for the said county of duly and legally authorized to perform and discharge the duties of said office, and then and there complained to the said justice in due form of law, that one G. H. [*here insert the complaint*,] which said complaint of the said C. D., on the said day of at said in the county aforesaid, came on to be heard, examined into, and tried, in due course of law, before the said E. F., Esq., justice of the peace as aforesaid; and that thereupon, then and there the said G. H. having personally appeared before the said E. F., Esq., such justice as aforesaid, to answer the matters and

charges contained in said complaint; and being then and there personally present, and having heard the same complaint read to him by the said E. F., such justice as aforesaid, he the said G. H. did then and there plead and allege, that he was not guilty of the said offence charged upon him in the said complaint; and thereupon the said E. F., as such justice as aforesaid, proceeded to hear and determine the matter of said complaint in the presence of the said G. H.; and that at and upon the said hearing of the said matter of said complaint by the said E. F., as such justice as aforesaid, I. J. of in the county of laborer, appeared as a witness in support of said complaint to and before the said E. F., Esq., and then and there as such witness, by and before the said E. F., Esq., such justice as aforesaid, was, in due form of law, sworn by the said E. F., Esq., to testify the truth, the whole truth, and nothing but the truth, relative to the complaint aforesaid, then and there in hearing before the said justice; (he the said E. F., Esq., then and there having sufficient and competent authority to administer an oath to the said I. J. in that behalf;) and that the said I. J., being so sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, wickedly devising and intending to subvert the truth, and maliciously and wrongfully intending and devising to cause the said G. H. to be convicted of the offence charged and alleged against him in said complaint, then and there, at and upon the hearing and trial of the said complaint, by and before the said E. F., Esq., as such justice as aforesaid, did, as such witness as aforesaid, on his oath aforesaid, falsely, maliciously, wickedly, wilfully, and corruptly say, depose, swear, and give evidence to and before the said E. F., Esq., so being such justice, and as such justice so hearing the matter upon the complaint aforesaid, amongst other things, in substance and to the effect following, that is to say, [*here insert the false testimony in the words in which it was given;*] whereas, in truth and in fact, [*here go on to negative the testimony in the words in which it was given.*] And so the jurors aforesaid, upon their oath aforesaid, do say, that the said I. J, then and there, by his own act and consent, and in manner and form aforesaid, did knowingly, falsely, wickedly, wilfullly, and corruptly commit wilful and corrupt perjury; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

274. *For Perjury, in filiating a Child, before a Justice of the Peace.*[1]

The jurors &c., upon their oath present, that C. D., of said B., single woman, on the day of at B. aforesaid, in the county aforesaid, was pregnant with child, and that the said child was likely to be born a bastard, and to be chargeable to the said town of B., in the county aforesaid; and that the said C. D., so being pregnant with child as aforesaid, wickedly and maliciously intending and contriving, not only to deprive one E. F. of his good name, fame, and reputation, and to put the said E. F. to great trouble and expense, but also falsely to charge the said E. F. with begetting her with child, and being the father of said child, of which she was then pregnant, on the day of at &c., aforesaid, in her own proper person, went before G. H., Esq., then being one of the justices of the peace in and for the county aforesaid, duly and legally authorized and empowered to discharge and perform the duties of said office, and having sufficient and competent power and authority to administer an oath, and take the examination of her the said C. D. hereinafter mentioned, then and there the said C. D. was duly sworn before the said G. H., Esq., being such justice as aforesaid, and the said C. D. being then and there lawfully required to depose the truth in a proceeding in a course of justice, did then and there, upon her oath aforesaid, before the said G. H., Esq., as aforesaid, wilfully, and of her own free will and accord, falsely, wickedly, and corruptly, and with a design to burden the said E. F. with the maintenance of said bastard child, say, depose, swear, and give in her examination, in writing, and under oath, as follows, to wit; "the volutary examination of C. D. of &c., who saith," [*here insert the examination verbatim;*] whereas, in truth and in fact, the said E. F. was not, nor is the father of said child, with which the said C. D. was then pregnant, nor of any other child of the body of the said C. D. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D., in manner and form aforesaid, wickedly, wilfully, falsely, and corruptly did commit wilful perjury; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

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[1] 2 Chitt. 438; 4 Went. 232; Stark. 515, note *(a.)*

275. *For Perjury, in giving Evidence on the Trial of an Issue on an Indictment for Perjury.*[1]

The jurors &c., upon their oath present, that at the Supreme Judicial Court of the said Commonwealth, begun and holden at B., within and for the county of S., on the first Tuesday of November, in the year of our Lord one thousand eight hundred and twenty, before Isaac Parker, Esq., then chief justice of the said court, a certain issue, in due manner joined in the said court, between the Commonwealth aforesaid and one C. D., upon a certain indictment then depending against the said C. D. for wilful and corrupt perjury, came on to be tried, and was then and there, in due form of law, tried, by a certain jury of the country, in due manner returned, impannelled, and sworn for that purpose; and that at and upon the trial of said issue, E. F., late of B., in the county aforesaid, laborer, did then and there appear, and was produced as a witness for and on behalf of the said Commonwealth, and against the said C. D., upon the trial of the said issue, and the said E. F. was then and there duly sworn, as such witness as aforesaid, before the said Isaac Parker, Esq., then chief justice as aforesaid, that the evidence which he should give to the court and jury, between the said Commonwealth and the said C. D., the defendant, on the issue then depending, should be the truth, the whole truth, and nothing but the truth, (the said Isaac Parker, Esq., as the said Chief Justice of said court, then and there having sufficient and competent power and authority to administer the said oath to the said E. F. in that behalf;) and the said E. F., being so sworn as aforesaid, it then and there, upon the trial of the said issue, became and was a material inqury, whether [*here state the several material questions.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. F., maliciously and corruptly intending to injure and aggrieve the said C. D., and to cause and procure him to be convicted of the wilful and corrupt perjury, whereof he then stood indicted as aforesaid, and to subject him to the pains, penalties, and punishments of the laws of this Commonwealth inflicted on persons convicted of that crime, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, then and there, on the trial aforesaid of the said issue, upon his oath aforesaid, before the said Isaac Parker, Esq., Chief Justice as

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[1] 2 Chitt. 452, 453, note (*n*); 4 Went. 275, and 6 Went. 396.

aforesaid, having such competent authority to administer such oath as aforesaid, falsely, wickedly, knowingly, wilfully, and corruptly did say, depose, swear, and give evidence, to the said court and jury, amongst other things, in substance and to the effect following, that is to say, [*here set out the evidence;*] whereas, in truth and in fact, the said C. D. did not [*here assign the perjury, by negativing the false evidence given by the witness.*] And so the jurors aforesaid, upon their oath aforesaid, do say, that the said E. F. falsely, wickedly, wilfully, and corruptly, by his own voluntary act and consent, and of his own wicked mind and disposition, did then and there, in manner and form aforesaid, commit wilful and corrupt perjury; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

276. *For Perjury, on a Trial in the Supreme Judicial Court in a Civil Action.*

The jurors &c., upon their oath present, that heretofore, to wit, at the Supreme Judicial Court, begun and holden at B., within and for the said county of S., on the Tuesday of in the year of our Lord one thousand eight hundred and twenty before I. P., then being Chief Justice of the same court, a certain issue duly joined in the said court, between one C. D. and one E. F., in a certain plea of trespass, came on to be tried in due form of law, and was then and there tried by a certain jury of the country, duly summoned, impannelled, and sworn between the parties aforesaid; and that, upon the said trial, G. H. of said B., yeoman, appeared as a witness on the behalf of the said E. F., the defendant, and was duly sworn, and took his oath before the said I. P., Chief Justice as aforesaid, to speak the truth, the whole truth, and nothing but the truth, touching the matters in issue on the said trial; he the said I. P., Chief Justice as aforesaid, having sufficient and competent power and authority to administer the said oath to the said G. H. in that behalf; and that at and upon the said trial, certain questions became and were material, in substance as follows, that is to say, [*here state the material questions;*] and that the said E. F., being so sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, at and upon the said trial at the court aforesaid, then and there falsely, wilfully, voluntarily, and corruptly did say, depose, and swear, among other things, in substance and to the effect following, that is to say, [*here state the evidence with proper inu-*

endoes;] whereas, in truth and in fact, [*here assign the perjury by negativing the evidence.*] And so the jurors aforesaid, upon their oath aforesaid, do say, that the said G. H., in manner and form aforesaid, did commit wilful and corrupt perjury; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

277. *For Perjury, on the Trial of an Issue in an Action of Assumpsit.*[1]

The jurors &c., upon their oath present, that at the Supreme Judicial Court of said Commonwealth, begun and holden at within and for the county of on the Tuesday of in the year of our Lord &c. before I. P., Esq., then being the Chief Justice of the said court, a certain issue duly joined in the said court, between one C. D. and one E. F., in a certain plea of the case upon promises, alleged by the said C. D. to have been made by him the said E. F. and not performed, in which the said C. D. was plaintiff, and the said E. F. was defendant, came on to be tried in due form and course of law, and was then and there tried by a certain jury of the country in that behalf, duly summoned, impannelled, and sworn between the parties aforesaid; and that upon the trial of the said issue so joined between the parties aforesaid, G. H., late of in the county of yeoman, appeared as a witness for and on behalf of the said C. D., the plaintiff, in the plea abovementioned, and was duly sworn and took his oath before the said I. P., Chief Justice as aforesaid of the said Supreme Judicial Court, to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue, he the said I. P. being then Chief Justice as aforesaid, then and there having competent authority to administer the said oath to the said G. H. in that behalf; and that upon the trial of the said issue, so joined between the parties aforesaid, certain questions then and there became and were material, that is to say, [*here state the material questions;*] and the said G. H., being so sworn as aforesaid, and then and there being lawfully required to depose the truth in a proceeding in a course of justice, falsely, wickedly, wilfully, corruptly, and maliciously contriving and intending, as much as in him lay, to prevent justice and pervert the due course of law, and to cause a verdict to pass against the said E. F. on the trial of the said issue, and thereby

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[1] Stark. 521.

to subject him to the payment of sundry heavy costs, charges, and expenses, then and there falsely, wickedly, wilfully, and corruptly, and by his own act and consent, did say, depose, swear, and give evidence, among other things, on the trial aforesaid to and before the said jurors, so sworn to try the said issue as aforesaid, and to and before the Chief Justice aforesaid, in substance and to the effect following, that is to say, [*here set out the false testimony with proper inuendoes ;*] whereas, in truth and in fact, [*here assign the perjury by negativing the false testimony.*] And so the jurors aforesaid, upon their oath aforesaid, do say, that the said G. H. then and there falsely, wickedly, wilfully, and corruptly, and by his own voluntary act, and of his own wicked mind and disposition, in manner and form aforesaid, did commit wilful and corrupt perjury; in evil example to others to offend in like case, against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

278. *For Perjury, in taking the Poor Debtors' Oath, &c.*[1]

The jurors &c., upon their oath present, that by the consideration of the justices of the Circuit Court of Common Pleas for the Middle Circuit, holden at Boston, within and for the county of Suffolk, on the last Tuesday of December, in the year of our Lord one thousand eight hundred and twelve, one S. C. A. and one J. B. recovered judgment against J. T. of M., in the county of W. aforesaid, trader, for the sum of four hundred and fifty-seven dollars and seven cents, damage, and twenty-five dollars and fifteen cents costs of suit; and that afterwards, to wit, on the fifteenth day of January, in the year of our Lord one thousand eight hundred and thirteen, execution of said judgment then remaining to be done, they the said S. C. A. and J. B. purchased out their writ of execution from the clerk's office of the said Circuit Court of Common Pleas for the Middle Circuit, directed to the sheriff of the said county of W. or his deputy, and commanding them or either of them, that of the goods, chattels, or lands of the said J. T., within their precinct, they cause to be paid and satisfied unto the said S. C. A. and the said J. B., at the value thereof in money, the aforesaid sums, being four hundred and eighty-two dollars and twenty-two cents, in the whole, with twenty-five cents more for that writ, and thereof also to satisfy himself for his own fees; and for want of goods, chat-

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[1] 2 Mass. Laws, Stat. 1816, c. 55.

tels, or lands, of the said J. T., to be by said T. shown unto him to the acceptance of the said S. C. A. and J. B., or found within his said precinct, to satisfy the sums aforesaid, the said sheriff or his deputy was therein commanded to take the body of the said J. T., and him commit to the gaol in W., in the said county of W., and detain in his custody within the said gaol, until he pay the full sums abovementioned, with his the said sheriff's or his deputy's fees, or that he be discharged by the said S. C. A. and J. B., the creditors, or otherwise by order of law; and the said sheriff or his deputy was therein commanded to make return of said writ, with his doings therein, into the said Circuit Court of Common Pleas, to be holden at B., within the county of S. aforesaid, on the fourth Tuesday of March then next; and the said S. C. A. and J. B. then and there delivered the same writ of execution to one A. B., then and ever since one of the deputy sheriffs for the said county of W., to be by him served in due course of law; and that the said A. B., deputy sheriff as aforesaid, afterwards, to wit, on the eighteenth day of March, in the year of our Lord one thousand eight hundred and thirteen, and before the said writ of execution was returnable, for want of goods, chattels, or lands of the said J. T., found within his precinct, or shown to him by said J. T., arrested the body of the said J. T., and him committed to the Commonwealth's gaol in W., in the county of W. aforesaid, as by the said writ of execution he was commanded. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the eighteenth day of March, in the year of our Lord one thousand eight hundred and eighteen, he the said J. T. then standing committed as aforesaid, by force of the writ of execution aforesaid, then and there did complain, by a writing under his hand, to N. H., under keeper of the said gaol in W., in the county of W. aforesaid, that he had not estate sufficient to support himself in prison, and requested the said N. H. to make application to some justice of the peace in said county of W. for a notification to his said creditors, at whose suit he was committed, signifying his desire to take the benefit of the law provided in behalf of poor prisoners; and thereupon the said N. H., the under keeper of the gaol aforesaid, did then and there apply in writing to A. L., Esq., one of the justices of the peace within and for the said county of W., therein signifying the complaint aforesaid of the said J. T.; and thereupon, on the said eighteenth day of March, in the year last aforesaid, the said A. L. made out a notification in writing, under his hand and seal, directed to the said S. C. A. and J. B., in which he signi-

fied to them, the creditors aforesaid, the desire of the said J. T. to take the privilege and benefit allowed in and by "an act entitled an act for the relief of poor prisoners committed by execution for debt," and therein notified them of the time and place appointed for the intended caption of the oath prescribed by the statute in such case made and provided; which notification was then and there, on the day and year last aforesaid, duly served on the said S. C. A. and said J. B., thirty days before the time appointed for the caption of the oath aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the twenty-second day of April, in the year last aforesaid, at the gaol aforesaid, in the county of W. aforesaid, (being the time and place appointed in said notification for the caption of the oath aforesaid,) A. L. and W. C. W., Esqrs., two of the justices of the peace within and for the said county of W., each of whom was then of the *quorum*, and disinterested and not related either to the said creditors or the debtor, did assemble and call before them the said J. T. for the purpose of hearing and examining the said J. T., and administering to him the oath aforesaid; and that he the said J. T. did then and there appear before the said two last mentioned justices, (they the same two justices of the *quorum* then and there having sufficient and competent power and authority to administer the said oath to the said J. T. in that behalf,) and that he the said J. T., wickedly intending by color and pretext of the acts and statutes of the said Commonwealth to deceive and defraud the said S. C. A. and J. B., his creditors aforesaid, of their just debt aforesaid, then and there, to wit, on the twenty-second day of April, in the year of our Lord one thousand eight hundred and eighteen, at W. aforesaid, in the county of W. aforesaid, at the gaol aforesaid, before the two justices of the *quorum* aforesaid, falsely, wilfully, maliciously, and corruptly did swear, depose, and declare, on oath, in the words following, to wit, [*here insert the oath;*][1] and that after the taking of the said oath, the two justices of the *quorum* aforesaid made their certificate thereof to the said under keeper of the gaol aforesaid, who thereupon then and there discharged the said J. T. from the gaol aforesaid to go at large; whereas, in truth and in fact, after the commencement of the said suit against the said J. T. by the said S. C. A. and J. B., and before the taking of the said oath, and during the confinement of the said J. T. on the execution aforesaid, to wit, on the seventeenth day

[1] See 2 Mass. Laws, Stat. 1816, c. 55, for the form of the oath.

of April, in the year of our Lord one thousand eight hundred and thirteen, he the said J. T. conveyed away a large and valuable real estate, lying in M., in the county aforesaid, consisting of ten acres and one hundred and thirteen rods of land, to one A. T., his brother, with intent to secure the same to, and in trust for his own use, and to defraud his just creditors thereof; and which said estate and the full value thereof, after his taking the oath aforesaid, he received to his own use, and that he the said J. T., at the time of his taking the oath aforesaid, had a number of outstanding good and *bonâ fide* debts due to him on notes and accounts, and other personal estate in his possession and control, and which, after his taking the oath aforesaid, he collected and ecovered to his own use and benefit, to the amount of fourrhundred dollars. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. T., in manner and form aforesaid, on the said twenty-second day of April, in the year of our Lord one thousand eight hundred and eighteen, at W. aforesaid, in the county aforesaid, on his oath aforesaid, before the said two justices of the *quorum* aforesaid, by his own act and consent, and of his own wicked and corrupt mind and disposition, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly, did commit wilful and corrupt perjury; in evil and pernicious example to others in like case to offend, against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

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[1] This precedent is taken from an indictment drawn by the present Attorney General of Massachusetts.

FORMS OF INDICTMENTS FOR SUBORNATION OF PERJURY.

279. *For Subornation of Perjury, by procuring a Woman to swear a Bastard Child upon an innocent Man.*[1]

The jurors &c., upon their oath present, that one C. D., of &c., single woman, on the day of now last past, at B. aforesaid, was pregnant with child, and that said child was likely to be born a bastard, and be chargeable to the said town of B. in the said county of S.; and that on the said day of aforesaid, at B aforesaid, E. F., of B., in the county of S., yeoman, being a person of an evil mind and disposition, and wickedly and maliciously contriving and intending to deprive one G. H., not only of his good name, fame, and reputation, and to put him to great trouble and expense, but also to cause the said G. H. to be falsely charged with begetting the said C. D. with child, and with being the father of said child with which the said C. D. was then and there pregnant as aforesaid, did falsely, wickedly, knowingly, wilfully, and corruptly solicit, suborn, and procure the said C. D. to go before I. J., Esq., then and still one of the justices of the peace in and for the said county of S., duly and legally empowered and qualified to discharge and perform the duties of said office, and make oath that the said G. H. was the father of the said child, with which she was then pregnant. And the jurors aforesaid, upon their oath aforesaid, do further present, that in consequence, and by the means, encouragement, and effects of the said wicked and corrupt subornation and procurement of the said E. F., she the said C. D. afterwards, to wit, on the same day of in the year aforesaid, at said B., in the county aforesaid, did go in her proper person before the said I. J., Esq., being such justice as aforesaid, and having then and there sufficient and competent power and authority to administer an oath and take the examination of the said C. D. hereinafter mentioned; and the said C. D. was then and there sworn before the said I. J., Esq.; and the said C. D. being so sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, by the means and in consequence of the said wicked solicitation, subornation, and procurement of the said E. F., did then and there, upon her oath aforesaid,

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[1] See similar precedents 2 Chitt. 476; 2 Stark. 529; Cro. C. A. 213.

before the said I. J., being such justice as aforesaid, falsely, wickedly, wilfully, and corruptly say, depose, and swear, and give in her examination, in writing, and under oath, as follows, [*here copy and insert the examination verbatim, with proper inuendoes;*] whereas, in truth and in fact, the said E. F., at the time of soliciting, suborning, and procuring the said C. D. corruptly and falsely to swear as aforesaid, well knew that the said G. H. was not the father of the said child, with which she was then pregnant as aforesaid. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said E. F., then and there, in manner and form aforesaid, did falsely, knowingly, wilfully, and corruptly commit subornation of perjury, by wilfully, falsely, knowingly, and corruptly suborning and procuring the said C. D. to commit wilful and corrupt perjury, in and by her oath aforesaid, in manner and form aforesaid; against the peace and dignity of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

280. *For endeavouring to suborn a Person to give Evidence on the Trial of an Issue in the Supreme Judicial Court.*[1]

The jurors &c., upon their oath present, that at the Supreme Judicial Court, begun and holden at B., within and for the county of S., on the Tuesday of in the year of our Lord one thousand eight hundred and two, before Isaac Parker, Esq., then the Chief Justice of the said court, a certain issue duly joined in the said court between one C. D. and one E. F. in a certain plea of trespass, wherein it was alleged, in substance, that the said E. F. had, with force and arms, assaulted, beat, bruised, wounded, and ill-treated the said C. D., in which the said C. D. was plaintiff, and the said E. F. was defendant, came on to be tried in due form of law, and was then and there tried by a certain jury of the country in that behalf duly summoned, taken, impannelled, and sworn between the parties aforesaid; and that before the trial of the said issue, and during the time the same was pending, to wit, on the day of at B. aforesaid, in the county aforesaid, G. H. of in the county aforesaid, grocer, wickedly contriving and intending, as much as in him lay, to prevent justice and pervert the due course of law, and intending unjustly to aggrieve the said E. F., the de-

[1] Cro. C. C. 587, (6th Ed.) This precedent is drawn on the statute of Massachusetts of 1812, c. 143, but it concludes also at common law. See also 2 Chitt. 482, which cites the above precedent from Cro. C. C. 587, (6th Ed.)

fendant above named, and wickedly to cause and procure the said E. F. to be found guilty of the premises alleged against him in the said issue, and thereby to subject him to the payment of large sums of money for the payment of damages and costs to be recovered against him in the suit aforesaid, then and there, on the same day and year last aforesaid, at B. aforesaid, in the said county of S., did unlawfully and wickedly solicit, instigate, and, as much as in him lay, wilfully and corruptly endeavour to persuade and procure one I. J. to be and appear as a witness on the part and behalf of the said C. D., the plaintiff aforesaid, at the trial of said issue, so as aforesaid joined, and, upon the same trial, to commit wilful and corrupt perjury, by falsely swearing and giving in evidence to and before the jurors of the jury aforesaid, so sworn between the parties aforesaid to try the said issue, in substance and to the effect following, that is to say, [*here insert the evidence which the party was instigated to give, with proper inuendoes if necessary;*] whereas, in truth and in fact, [*here assign the perjury intended to be committed, by negativing the false evidence intended to be given;*] in manifest subversion of justice, against the peace and dignity of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided.

281. *For persuading a Witness not to give Evidence against a Person charged with an Offence before the Grand Jury.*[1]

The jurors &c., upon their oath present, that heretofore, to wit, on &c., A. B., of &c., [*here state the authority of the government by which the attendance of the witness was compelled, whether a summons or a recognisance.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that at the time of taking said recognisance, [*or the service of said summons, as the case may be,*] and from then until, and upon the said day of therein mentioned, the evidence of the said A. B. was material and necessary to have been given in before the said grand jury, on the subject-matter then to be heard and considered by them; which said grand jury were then and there duly and legally convened, on that behalf, and were legally authorized and had competent authority to consider and decide upon the subject-matter then and there, by them to

[1] This is an offence at common law, for which see Hawk. b. 1, c. 21, § 15. The mere attempt to stifle evidence, though it does not succeed, is criminal. 6 East, 464; 2 East, 5, 21, 22; 2 Str. 904; 2 Leach, 925.

be heard; and that at the said term of said court, [*here describe the court,*] a bill of indictment was prepared against the said A. B. for the offence aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D., of &c., contriving and intending the due course of justice to obstruct and impede, on at unlawfully and unjustly dissuaded, hindered, and prevented the said A. B. from appearing before the justices of said court, and before the said grand jury, to give evidence before the said grand jury on the bill of indictment preferred as aforesaid against the said and that in consequence thereof the said A. B. did not appear and give evidence according to his duty in that respect; against the peace and dignity of the Commonwealth aforesaid.

282. *For Subornation of Perjury, on a Trial for Robbery, where the Prisoner set up an Alibi.*[1]

The jurors &c., upon their oath present, that at the Supreme Judicial Court of said Commonwealth, holden at on before the justices of said Supreme Judicial Court, a certain indictment was presented and returned in due course of law by the grand jury for the said county against one A. B., in the form following, to wit, [*here insert the indictment;*] and that afterwards such proceedings were had, as that the said A. B. was duly and legally arrested and brought into said court, and being duly and legally arraigned upon said indictment, pleaded to the same that he was not guilty thereof; upon which issue, such proceedings were had, that afterwards, to wit, at the said Supreme Judicial Court, so held as aforesaid, a trial was had and held by the jury aforesaid, between the said Commonwealth and the said A. B. upon the said indictment; upon which said trial, evidence was given on behalf of said Commonwealth against the said A. B. that the felony and robbery, in the said indictment specified and charged, was committed by the said A. B., on at And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D., late of being a person of an evil and wicked mind and disposition, and devising and intending as much as in him lay, to pervert the due course of law and justice, and to cause and procure the said A. B. to be entirely acquitted of the said felony and robbery charged on him by the said indictment, and to escape unpunished for the same, did,

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[1] 2 Chitt. 478, 479.

before the said trial, to wit, on at unlawfully and wickedly solicit, incite, and endeavour to persuade one E. F. to appear as a witness on the said trial, so as aforesaid had, for and on behalf of the said A. B., and on the said trial, falsely to depose, say, and give evidence upon his oath to the court and jury aforesaid, that the said A. B. [*here insert the evidence given by the said E. F. to prove the alibi;*] whereas in truth and in fact, the said E. F. did not [*here negative the testimony given by the said E. F.;*] and whereas in truth and in fact, at the time when the said C. D. did so solicit, invite, and endeavour to persuade the said E. F. to give such evidence upon his oath as aforesaid, he the said C. D. well knew that the said E. F. would not give his evidence according to the truth, and that the same evidence so to be given, was false, feigned, and altogether fictitious; to the evil example to others in like case to offend, against the peace and dignity of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

PIRACY.

283. *Against several, for piratically attacking, taking, and carrying away a Ship, with Goods &c. on board.*[1]

The jurors &c., upon their oath present, that A. B., late of said B., mariner, [*and eight others, with the like additions,*] on upon the high sea, out of the jurisdiction of any particular State, with force and arms, did piratically and feloniously set upon, board, break, and enter a certain merchant ship called the Governor Strong, then being a ship belonging exclusively to certain citizens of the United States, to the jurors aforesaid as yet unknown; and then and there piratically and feloniously did assault certain mariners, whose names to the jurors aforesaid are also as yet unknown, in the same ship then and there being; and did then and there upon the high sea aforesaid, out of the

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[1] 3 Chitt. 1130, 1131; Cro. C. A. 316; 2 Stark. 455. The indictment from which this precedent was taken was used against Captain Kidd and others. 5 State Trials, 287; 3 Chitt. 1131, note (*b.*) See Statute of United States, April 30, 1819, § 8. Gordon's Dig. Art. 364, p. 716, note (*b.*)

jurisdiction of any particular State, piratically and feloniously put the said mariners in great fear and bodily danger of their lives; and the said merchant ship and the tackle, and apparel of the same, of the value of three thousand dollars, together with seventy chests of opium, of the value of five thousand dollars, then and there being in and on board the same ship, of the goods and chattels of certain citizens of the said United States to the said jurors as yet unknown; and then and there upon the high sea aforesaid, out of the jurisdiction of any particular State, being under the care and custody, and in the possession of the mariners aforesaid, they the said A. B., [*and the others, naming them*,] from the care, custody, and possession of the mariners aforesaid, then and there, to wit, upon the high sea aforesaid, out of the jurisdiction of any particular State, piratically and feloniously, and by force and violence, and against the will of the mariners aforesaid, did steal, take, rob, and run away with; against the peace of said United States, and contrary to the form of the statute thereof in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., [*and the others, naming them*,] the offenders aforesaid, were first brought into B. aforesaid, in the said district of Massachusetts, after the commission of said offence; and that the said district of Massachusetts is the district into which they were first brought.

284. *For piratically running away with a Vessel by the Mariners of the same Vessel.*[1]

The jurors &c., upon their oath present, that A. B., [*and ten others, naming them, and giving to each his proper addition*,] on the day of they the said A. B., [*and the others*,] then being mariners of, in, and on board a certain vessel of the said United States, called the Plattsburg, belonging and appertaining exclusively to citizens of the United States aforesaid, (whose names are to the jurors aforesaid as yet unknown,) with force and arms, and upon the high sea, out of the jurisdiction of any particular State, in and on board said vessel, whereof one W. H. was then and there master and commander; the same vessel, and the tackle, apparel, and furniture thereof, of the value of ten thousand dollars; and certain goods and merchandise, to wit, [*here state the articles and allege the value of*

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[1] See a similar precedent in 3 Chitt. 1132, for running away with ship's boat. The form is the same, except in the description of the property.

each,] all being then and there the goods, chattels, and property of certain citizens of the United States, (to the jurors as yet unknown,) then and there being laden on board said vessel called the Plattsburg ; then and there upon the high sea aforesaid, out of the jurisdiction of any particular State, did betray the trust reposed in them as mariners of said ship, and then and there turn pirates; and the same ship, with force and arms, piratically and feloniously did steal, take, and run away with ; they the said A. B., [*and the others,*] being then and there mariners of the said vessel, and in and on board thereof, upon the high sea aforesaid, out of the jurisdiction of any particular State ; against the peace of the said United States, and contrary to the form of the statute of the Congress of said United States in such case made and provided. [*Then go on and allege that the offenders were first brought into, or first arrested in this district of Massachusetts, as in the conclusion of the next preceding precedent.*][1]

285. *For Piracy, by causing a Revolt in a Merchant Ship.*[2]

The jurors &c., upon their oath present, that A. B., of &c., (and ten others whose names are to the jurors aforesaid, as yet unknown,) on upon the high sea, and out of the jurisdiction of any particular State, being mariners, in and on board a certain merchant ship called the Dove, the said ship Dove then being a ship belonging exclusively to certain citizens of the said United States, whose names are to the jurors aforesaid as yet unknown, whereof one C. D., a citizen of the said United States was then master, piratically and feloniously did endeavour to make, and did make a revolt in the same ship, the said C. D. then and there being master of the same ship as aforesaid ; against the peace of the said United States, and contrary to the form of the statute thereof in such case made and provided.

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[1] The two foregoing precedents may be adapted to all the other cases contemplated in the statute of the United States, using in the forms, the precise words of the statute applicable to the case.

[2] 3 Chitt. 1131 ; Cro. C. C. 591, (6th Ed.) ; Cro. C. A. 316.

286. *For piratically taking and running away with a Ship, Tackle, Cargo, &c.*[1]

The jurors &c., upon their oath present, that A. B., of &c., C. D., of &c., and E. F., of &c., on upon the high sea, and out of the jurisdiction of any particular State, then being mariners,[2] in and on board a certain merchant ship, called the Dove, whereof one G. H., a citizen of the said United States, was then master; the said ship Dove then being a ship belonging to certain citizens of the United States, to the jurors aforesaid as yet unknown, upon the high sea aforesaid, and out of the jurisdiction of any particular State, did betray the trust reposed in them, as mariners of the said ship, and then and there upon the high sea aforesaid, out of the jurisdiction of any particular State, did turn pirates, and the same ship, and the apparel and tackle thereof, of the value of and one hundred hogsheads of sugar of the value of [*here state all the goods and property, piratically taken and carried away, with the value of each article,*] of the goods and chattels of certain citizens of the said United States, to the jurors aforesaid as yet unknown, then and there being in the same ship, under the care and custody, and in the possession of the said G. H., as master of the said ship, then and there, upon the high sea aforesaid, out of the jurisdiction of any particular State, from the care, custody, and possession of the said G. H., piratically and feloniously did steal, take, and run away with, they the said A. B., C. D., and E. F., then and there being mariners of the said ship, and in and on board the said ship on the high sea as aforesaid; against the peace of the said United States, and contrary to the form of the statute thereof in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. D. and E. F., the offenders aforesaid, after the commission of said offence, to wit, on were first brought into the said Massachusetts district, and that the said Massachusetts district is the district into which the said offenders were first brought as aforesaid.

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[1] Cro. C. C. 592, (6th Ed.); 3 Chitt. 1131, 1132; Statute of United States of April 30, 1819, § 8; Gordon's Digest, p. 716, note (*b.*) See a similar precedent, 1 Gall. Rep. 247, *United States* v. *Tully et al.*

[2] Or "captain," if such be the case.

287. *Against a Captain or Mariner for voluntarily yielding up his Vessel to a Pirate.*[1]

The jurors &c., upon their oath present, that A. B., of on &c., upon the high sea, out of the jurisdiction of any particular State, he the said A. B. then being master and captain of [*or a mariner in and on board*] a certain merchant ship, called the then and there belonging and appertaining to certain citizens of the United States, to the jurors aforesaid unknown; and the said A. B., then being a citizen of said United States and captain of the said ship as aforesaid, did betray the trust in him the said A. B. reposed, and did then and there on the high sea, out of the jurisdiction of any particular State, wilfully, voluntarily, piratically, and feloniously yield up and surrender the said ship, of which he was then and there captain as aforesaid, to certain pirates, whose names are to said jurors unknown; against the peace of the said United States, and contrary to the form of the statute thereof in such case made and provided.

288. *Against a Seaman for laying violent Hands upon his Commander,*[2] *with intent to prevent his fighting in Defence of his Ship.*

The jurors &c., upon their oath present, that A. B., of &c., on on the high sea, out of the jurisdiction of any particular State, he the said A. B. then and there being a seaman on board a certain ship, called the belonging exclusively to certain citizens of the said United States, to the jurors aforesaid yet unknown, in and upon the body of one C. D., he the said C. D. then and there being the commander of the said ship called the on the high sea aforesaid, out of the jurisdiction of any particular State, feloniously and piratically did make an assault; and that the said A. B., being then and there such seaman as aforesaid, in and on board the ship aforesaid, feloniously and piratically, did lay violent hands upon him the said C. D., commander of said ship as aforesaid, and the commander of him the said A. B. on board the same ship; with intent, thereby piratically and feloniously to hinder and prevent him the said C. D.. commander of said ship as aforesaid, from fighting in defence of his said ship, and of the goods and chattels then on

[1] On the act of Congress of April 30, 1819, § 8. Gordon's Digest, p. 716.

[2] Ibid.

board the same, committed to the trust of him the said C. D; against the peace of the said United States, and contrary to the form of the statute thereof in such case made and provided.

289. *Against an Accessory to a Piracy before the Fact.*[1]

[*Set forth the charge against the principal, as in the preceding precedents, as the case may be, and then proceed as follows:*] And the jurors aforesaid, upon their oath aforesaid, do further present, that E. F., of &c., before the piracy and felony aforesaid was committed, in manner and form aforesaid, to wit, on the said day of in the year aforesaid, on the high sea, out of the jurisdiction of any particular State,[1] did piratically and feloniously, knowingly and wittingly, aid and assist, procure, command, counsel, and advise the said A. B. the piracy and felony aforesaid to do and commit. And the jurors aforesaid, upon their oath aforesaid, do further present, that the felony and piracy aforesaid, so as aforesaid done and committed by the said A. B., did affect the life of him the said A. B.; and that the said A. B. did do and commit the piracy and felony aforesaid, in manner aforesaid, upon the high sea, without the jurisdiction of any particular State, upon and in pursuance of the aid, assistance, procurement, command, counsel, and advice aforesaid, of the said E. F., given and rendered as aforesaid to the said A. B. by him the said E. F.; against the peace of the said United States, and contrary to the form of the statute thereof in such case made and provided.

290. *Against an Accessory to a Piracy after the Fact.*[2]

[*Set forth the charge against the principal, as in the preceding precedents, as the case may be, and then proceed as follows:*] And the jurors aforesaid, upon their oath aforesaid, do further present, that E. F., of &c., afterwards, to wit, on the said day of in the year aforesaid, on the high seas, [*or on the land, if such be the fact, naming the place,*][3] out of the jurisdiction of any particular State, well knowing that the said A. B. had done and committed the felony and piracy aforesaid, did knowingly entertain and conceal the said A. B., and did know-

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[1] Act of Congress of April 30, 1790, § 10. If the aiding &c. was given and rendered *on the land,* it must be so alleged, naming the particular place. See the section of the statute above quoted.

[2] Act of Congress of April 30, 1790, § 11.

[3] Ibid.

ingly receive and take into the custody of him the said E. F. the said vessel, goods, and chattels, which had been by the said A. B. piratically and feloniously taken as aforesaid, he the said E. F. then and there well knowing the same to have been piratically and feloniously taken as aforesaid; against the peace of said United States, and contrary to the form of the statute thereof, in such case made and provided.

291. *For breaking and boarding a Ship, assaulting &c. the Crew, and stealing &c. the Cargo.*[1]

The jurors of the United States of America, within and for the district aforesaid, upon their oath present, that John Palmer, [*and others, naming them,*] of on upon the high sea, out of the jurisdiction of any particular State, did piratically and feloniously set upon, board, break, and enter a certain ship, called the then and there being a ship belonging to certain persons to the jurors aforesaid unknown, and then and there piratically and feloniously did make an assault in and upon certain persons, whose names are to the jurors aforesaid unknown, being mariners in the same ship; and then and there piratically and feloniously did put the aforesaid persons, mariners of the same ship as aforesaid, and in the ship aforesaid then and there being, in personal fear and danger of their lives; then and there in the ship aforesaid, upon the high sea aforesaid, and out of the jurisdiction of any particular State as aforesaid; and piratically and feloniously did then and there steal, take, and carry away five hundred boxes of sugar, of the value of $20,000, [*here set forth all the articles stolen with the value of each,*] of the goods and chattels of certain persons to the jurors aforesaid unknown, then and there upon the high sea aforesaid, out of the jurisdiction of any particular State, being found in the aforesaid ship, in custody and possession of the said mariners of the said ship, from the said mariners in the said ship, and from their custody and possession then and there upon the high sea aforesaid, out of the jurisdiction of any particular State, as aforesaid; against the peace of the said United States, and contrary to the form of the statute of the said United States in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that the aforesaid district of Massachusetts, is the district where the offenders aforesaid [*it is best to repeat their names*] were first apprehended for the said offence.

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[1] *United States* v. *Palmer et al.*, 3 Wheat. R. 611.

292. *For stabbing, casting into the Sea, and drowning the Deceased.*[1]

The jurors &c., upon their oath present, that A. B., [*and others, naming them*,] being citizens of the United States, on upon the high sea, out of the jurisdiction of any particular State, in and on board a certain schooner, the name of which is to the jurors aforesaid unknown, in and upon one C. D., a mariner in and on board said vessel, piratically and feloniously did make an assault, and that he the said A. B., with a certain steel dagger, which he the said A. B. in his hand then and there had and held, the said C. D., in and upon the breast of him the said C. D., upon the high sea, and on board the schooner aforesaid, and out of the jurisdiction of any particular State, piratically and feloniously did strike and thrust, giving to the said C. D. in and upon the breast of him the said C. D., upon the high sea aforesaid, in and on board the said schooner, and out of the jurisdiction of any particular State, piratically and feloniously, in and upon the breast of him the said C. D. several grievous, dangerous, and mortal wounds; and did then and there, in and on board the schooner aforesaid, upon the high sea, and out of the jurisdiction of any particular State, piratically and feloniously, him the said C. D. cast and throw from out of the said schooner into the sea, and plunge, sink, and drown him in the sea aforesaid; of which said mortal wounds, casting, throwing, plunging, sinking, and drowning, the said C. D., in and upon the high sea aforesaid, out of the jurisdiction of any particular State, then and there instantly died. And the jurors aforesaid, upon their oath aforesaid, do say, that by reason of the casting and throwing the said C. D. in the sea as aforesaid, they cannot describe the said mortal wounds. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., [*and others*,] him the said C. D., then and there, upon the high sea aforesaid, out of the jurisdiction of any particular State, in manner and form aforesaid, piratically and feloniously did kill and murder; against the peace of the said United States, and contrary to the form of the statute thereof in such case made and provided.

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[1] *United States* v. *Holmes et al.*, 5 Wheat. 412.

POLYGAMY.

293. *Indictment for having two Wives at the same Time.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on &c., at &c., did marry one C. D., spinster, and her the said C. D. then and there had for his wife; and that the said A. B. afterwards, to wit, on &c., at &c., being then married to, and the lawful husband of the said C. D., did unlawfully marry and take to wife one E. F., of &c., widow, and to her the said E. F. was then and there married; the said C. D., his former wife, being then living and in full life; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

294. *Indictment for having two Husbands at ane and the same Time.*[2]

The jurors &c., upon their oath present, that A. B., on &c., being then married and the lawful wife of one C. D., at &c., did then and there unlawfully marry, and take to her husband one E. F., the said C. D., her former husband, being then in full life; against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.[3]

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[1] Statute of Massachusetts, 1784, c. 40; 2 Stark. 412, 413; 2 Chitt. 721, 18; Cro. C. A. 12.

[2] There is another count in the precedent from which this is taken, stating the time and place of the first marriage. It is the case of the *Duchess of Kingston*, on which she was tried and convicted before the House of Lords, and the precedent is taken from 4 Hargrave's St. Tr. 100.

[3] The first wife cannot be a witness against her husband, or *vice versa*, for the first marriage was valid; but the second may after the first marriage has been established; for no legal relationship exists between them. 2 Chitt. 719, note (*o*). For the proof necessary to establish the first marriage, see 1 East P. C. 469 – 472.

SELLING UNWHOLESOME PROVISIONS.

295. *For selling unwholesome Provisions: On the Statute of Massachusetts*, 1784, *c.* 50.

The jurors &c., upon their oath present, that A. B., of on at in the county aforesaid, from motives of avarice and filthy lucre, was induced to sell and did sell to one C. D. a certain quantity of diseased, corrupted, contagious, and unwholesome provisions, for meat; that is to say, one hundred pounds' weight of diseased, corrupted, contagious, and unwholesome beef; knowing the same to be diseased, corrupted, unwholesome, and contagious, without making it known to him the said C. D., the buyer thereof; to the great damage of him the said C. D.; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

296. *At common law, for supplying unwholesome Bread.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at in the county aforesaid, knowingly, wilfully, maliciously, and deceitfully did provide, furnish, and deliver, to and for sundry prisoners of war, (whose names are to the jurors aforesaid yet unknown,) and who were then under the protection of the government of the United States, confined in a certain hospital, called hospital, situated in aforesaid, divers large quantities, to wit, five hundred pounds' weight of bread, to be eaten as food by the said prisoners of war; which bread was then and there made and baked in an unwholesome and insufficient manner, and was made of, and contained dirt, filth, and other pernicious and unwholesome materials and ingredients, not fit to be eaten as aforesaid; whereby the said prisoners of war did then and there eat of said bread, and thereby became distempered in their bodies, and injured and endangered in their healths; against the peace and dignity of the Commonwealth aforesaid.

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[1] 2 Stark. 656, note (*b*); *Rex* v. *Treeve*, East P. C. 821, where it was decided that this is an offence at common law. Also *Rex* v. *Dickson*, 2 Stark. 656, note (*a*), where it was decided not to be necessary that the noxious materials should be particularly stated.

RAPE.

297. *Form of an Indictment for a Rape.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on the day of with force and arms, at B. aforesaid, in the county aforesaid, in and upon one C. D., of &c., spinster, violently and feloniously did make an assault; and her the said C. D. then and there feloniously did ravish and carnally know, by force,[2] and against her will; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

298. *For carnally knowing and abusing a female Child under the Age of Ten Years.*[3]

The jurors &c., upon their oath present, that A. B., of &c., on the day of with force and arms, at B. aforesaid, in the county aforesaid, in and upon one C. D., a woman child under the age of ten years, to wit, of the age of eight years, feloniously did make an assault; and her the said C. D. then and there unlawfully and feloniously did carnally know and abuse; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

299. *Against two Persons for assaulting a married Woman with intent that one of them should ravish her.*[4]

The jurors &c., upon their oath present, that A. B., of &c., and C. D., of &c., on with force and arms, at in and upon one E. F., the wife of one G. F., of &c., did make an assault; and her the said E. F. did then and there beat, abuse, and ill-treat; with an intent that he the said A. B. her the said E. F. should then and there feloniously ravish, and carnally

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[1] On the statute of Massachusetts of 1805, c. 97; 3 Chitt. 815. See 2 Stark. 409; Cro. C. C. 611, (6th Ed.)

[2] The words "by force" are made use of in the statute of Massachusetts last above quoted. They are used in 1 Hawk. c. 41, § 1, in his definition of *Rape*. But they are not used in the English precedents for *Rape*.

[3] 3 Chitt. 815; 2 Stark. 409; Cro. C. C. 611, (6th Ed.) Statute of Massachusetts, 1805, c. 97.

[4] 3 Chitt. 817; 2 Stark. 386.

know, by force and against her will; against the peace and dignity of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided.

RESCUE.

Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment; and is generally the same offence in the stranger committing it, as it would have been in a gaoler to have permitted a voluntary escape. A rescue, therefore, of one apprehended for felony, is felony; and for a misdemeanor, a misdemeanor.[1] To constitute a rescue, the party rescued must be in actual custody. A prisoner, who breaks gaol, may be arraigned for that crime before he is convicted of the crime for which he was originally committed; but a stranger, or third person, who rescues a felon, cannot be found guilty before the felon is convicted.[2]

The indictment must set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question.[3]

300. *Indictment for rescuing a Person in Custody of a Constable under a Justice's Warrant.*[4]

The jurors &c., upon their oath present, that A. B., Esq., then and now one of the justices of the peace in and for the county of S., duly qualified and empowered to perform the duties of that office, did make his certain warrant in writing, under his hand and seal, directed to any of the constables of the town of   in the county aforesaid, by which said warrant the constables aforesaid were commanded to take the body of C. D., late of &c., and bring him before the said A. B., Esq., to be by him the said A. B., Esq., examined concerning an assault

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[1] 4 Black. Com. 131. [2] Hawk. b. 2, c. 21, § 8. [3] Id. § 5.
[4] 2 Chitt. 182, 183, note (*r*), and the precedents there referred to.

said to have been made and committed by him the said C. D. upon one E. F., of &c., which said warrant was afterwards, to wit, on at &c., delivered to one I. J., one of the constables of the said town of duly appointed and qualified to discharge and perform the duties of that office, to be by him executed in due form of law; and that the said I. J., so being constable as aforesaid, afterwards, to wit, on at aforesaid, by virtue of the said warrant, did take and arrest the said C. D. for the cause aforesaid; and him the said C. D. the said I. J. in his custody, by virtue of said warrant, then and there had; and that the said C. D., late of &c., and K. L., late of &c., well knowing the said C. D. so to be arrested as aforesaid, afterwards, to wit, on the said day of at B. aforesaid, with force and arms, in and upon the said I. J., the constable aforesaid, then and there being in the due and lawful execution of his said office, did make an assault; and him the said I. J. did then and there beat and abuse; and that the said K. L. him the said C. D. out of the custody of him the said I. J., and against the will of him the said I. J., then and there unlawfully did rescue and put at large, to go whither he would; and that the said C. D. himself, out of the custody of the said I. J. and against his will, then and there unlawfully did rescue and escape at large to go where he would; to the great damage of him the said I. J., and against the peace and dignity of the Commonwealth aforesaid.

301. *For rescuing Goods distrained for Rent.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at in due course of law, took and distrained one chest of draws of the value of four dollars, [*here describe the articles distrained*] of the goods and chattels of one C. D., then being in a certain lodging-room in the dwelling-house of him the said A. B., situate in the said town of B., and county aforesaid; which same distress was taken by the said A. B. for the sum of ten dollars; being the sum due for rent for one whole year, in arrear from the said C. D. to him the said A. B., for the lodging aforesaid; and that the said A. B., the goods and chattels aforesaid then and there had and detained in his custody for the cause aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that E. F., late of &c., in the county of yeoman, afterwards, to wit, on the day

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[1] 2 Chitt. 201, 202; Stark. 617, 389, 390; Cro. C. C. 618, (6th Ed.)

of in the year aforesaid, with force and arms, at aforesaid, in the county aforesaid, the said goods and chattels, so as aforesaid by him the said A. B. taken and distrained, and in the custody of him the said A. B. then and there being, from and out of the custody, and against the will of him the said A. B. then and there unlawfully and injuriously did rescue, take, and carry away; the said sum of ten dollars, for the rent in arrear, as aforesaid due, nor any part thereof being paid, and other wrongs then and there did, to the great damage of the said A. B., and aganist the peace and dignity of the Commonwealth aforesaid.

302. *For rescuing Cattle out of a Pound taken as Distress, Damage Feasant.*[1]

The jurors &c., upon their oath present, that on at one A. B. took and distrained one mare and two colts of the cattle of one C. D., of &c., of the price and value of one hundred dollars, in and upon a certain close or parcel of land of him the said A. B., called &c., lying and being in aforesaid wrongfully feeding and depasturing upon the grass, growing in and upon the said close and parcel of land, and doing damage to him the said A. B. there, as a distress for the damage then and there done and doing by the said cattle; and the said mare and colts so taken and distrained as aforesaid, he the said A. B., on the same day and year aforesaid, at aforesaid, in the common pound of the town of in the said county of impounded and kept and detained the same in the said common pound there, as a distress for the cause aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said mare and colts being so impounded, and remaining in the said common pound there, as a distress for the cause aforesaid, the said C. D., on at aforesaid, the said common pound broke and entered, and the said mare and colts from out of the same, without the license and against the will of the said A. B., and without any satisfaction having been made to the said A. B. for the said damage done by the said mare and colts as aforesaid, unlawfully did rescue, take, lead, and drive away; against the peace and dignity of the Commonwealth aforesaid.[2]

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[1] 2 Chitt. 204, note (*d*), where it is said that pound-breach is indictable at common law, and Hawk. b. 2, c. 21, § 20, is there quoted; Id. c. 10, § 56.

[2] There is a precedent in 2 Chitt. 203, 204, for a rescue of cattle taken damage feasant, *before they were impounded. Quære*, as to that precedent.

303. *For breaking a Pound and letting out a Mare.*[1]

The jurors &c., upon their oath present, that heretofore, to wit, on at one A. B., in due form of law, [*here state his authority*,] took and distrained one mare, the property of one C. D., of &c., of the value of in and upon a certain close of him the said A. B., situate and being in &c., and there wrongfully and unlawfully feeding and depasturing upon the herbage and grass of the said A. B., then growing and being in and upon the said close; and doing damage there to him the said A. B., as a distress for the said damage so then and there done and doing by the said mare, and the said mare so taken and restrained as aforesaid, he the said A. B., on at aforesaid, in a certain common and open pound of and belonging to the said town of B., and within the same town, impounded; and the same mare was duly and lawfully secured, kept, and detained in the said common pound there, by E. F., then and there being the lawful keeper of the said pound, as a distress for the cause aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said mare being so impounded and remaining in the said common pound there, as a distress for the cause aforesaid, the said C. D., afterwards, to wit, on at the said common pound broke and entered, and the said mare, from and out of the same, without the license or consent, and against the will of the said A. B., and of the said E. F., the keeper of said pound, and without any satisfaction being made to the said A. B. for the damage done by the said mare as aforesaid, unlawfully did rescue, take, lead, and drive away; against the peace and dignity of the Commonwealth aforesaid.

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[1] 2 Chitt. 205. See note (1) to the last preceding precedent; and note (*d*) to the precedent in 2 Chitt. 204, for rescuing cattle out of a pound, taken as a distress, damage feasant.

RIOT.

304. *Indictment for a Riot.*[1]

The jurors &c., upon their oath present, that A. B., C. D., and E. F., together with divers others to the number of ten, whose names are to the jurors aforesaid as yet unknown, on at aforesaid, in the county aforesaid, with force and arms, did unlawfully, riotously, and routously assemble, and gather themselves together to disturb the peace of the said Commonwealth; and then and there being so assembled and gathered together, did then and there make a great noise, riot, tumult, and disturbance, and then and there unlawfully, riotously, routously, and tumultuously remained and continued together, making such noises, riot, tumult, and disturbance, for the space of six hours then next following, to the great terror and disturbance of all the citizens of the said Commonwealth there passing and repassing in and along the public streets and common highways there, and against the peace and dignity of the Commonwealth aforesaid.

305. *For a Riot and Assault.*[2]

The jurors &c., upon their oath present, that A. B., C. D., and E. F., all of &c., together with divers others, evil disposed persons, to the jurors aforesaid unknown, on the day of with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully, riotously, and routously assemble and gather themselves together, to disturb the peace of the Commonwealth; and being then and there so assembled and gathered together, in and upon one G. H., unlawfully, riotously, and routously did make an assault; and him the said G. H., then and there unlawfully, riotously, and routously did beat, wound, and ill-treat, so that his life was thereby greatly endangered; and other wrongs then and there unlawfully, riotously, and routously did and committed, to the great damage of him the said G. H., to the great terror of the people, and against the peace and dignity of the Commonwealth aforesaid.

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[1] 2 Stark. 640; 2 Chitt. 488.

[2] 2 Stark. 640; 2 Chitt. 488, 500.

306. *For a Riot, Assault, and False Imprisonment.*[1]

[*The same form as in the next preceding precedent, until you come to the words, " so that his life was thereby greatly endangered," after which add,*] and him the said G. H., then and there, with force and arms, unlawfully, riotously, routously, and injuriously, against the will of him the said G. H., and contrary to the laws of this Commonwealth, without any legal warrant, authority, or justifiable or probable cause whatsoever therefor, did imprison and detain in prison, for the space of six hours then next following, and other wrongs to the said G. H. they the said A. B., C. D., and E. F., then and there, unlawfully, riotously, and routously did and committed; to the great terror and disturbance of the people, to the great damage of him the said G. H., and against the peace and dignity of the Commonwealth aforesaid.

307. *For riotously assembling to prevent the Execution of an Act of the Legislature, relative to the Revenue.*[2]

The jurors &c., upon their oath present, that C. D., E. F., and G. H., together with divers others, to wit, fifty other persons, to the said jurors as yet unknown, being riotous persons and disturbers of the peace, on at &c., with force and arms, unlawfully, riotously, and tumultuously did assemble and gather together to disturb the peace of the said Commonwealth, and with an intent unlawfully, riotously, and tumultuously to obstruct and hinder the execution of a certain act or law of the Legislature of this Commonwealth, made and passed on the day of &c., entitled " An act " &c., [*set out the title of the act,*] and being so assembled and gathered together, the said C. D., E. F., and G. H., and the said other persons, to the said jurors unknown, then and there unlawfully, riotously, and tumultuously remained and continued together, making great noises, and committing great violences and disturbances for the space of four hours; to the great terror of the people, there about inhabiting, resorting, and being, and of all other citizens of said Com-

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[1] 2 Chitt. 500; Cro. C. C. 623, (6th Ed.)

[2] 2 Chitt. 491, 492. This indictment was against Samuel Horn and others; Horn was convicted, 26 Geo. 3. See 2 Chitt. 492, note (*f*). See also a similar precedent, (2 Chitt. *ubi sup.*,) for a riot to prevent the execution of a turnpike road act.

monwealth, then and there passing the public highway there; to the evil example of all others in like case to offend, and against the peace and dignity of the Commonwealth aforesaid.

308. *For a Riot in the Theatre, and preventing the Performance of the Play.*[1]

The jurors &c., upon their oath present, that C. D., E. F., and G. H., together with other evil disposed and riotous persons, to the number of twenty, to the jurors aforesaid, as yet, unknown, on at &c., with force and arms, unlawfully, riotously, and tumultuously, did assemble and gather together to disturb the peace of said Commonwealth, at and in a certain theatre in B. aforesaid, called the Boston Theatre; and being so assembled and gathered together in the said theatre, then and there made and raised, and caused and procured to be made and raised a great noise, riot, tumult, and disturbance, in order to obstruct, and for the purpose of obstructing, preventing, and hindering the performance of the exhibition of a certain play, called "The Merchant of Venice," in the said theatre, which said play was appointed by the managers of said theatre to be then and there acted and performed at and in the said theatre on that day, according to public notice thereof in that behalf given; they the said managers of said theatre, then and there having lawful power, license, and authority for that purpose; and that the said C. D., E. F., G. H., and the said other persons, to the said jurors unknown, did then and there, with force as aforesaid, unlawfully, tumultuously, riotously, and routously obstruct, prevent, and totally hinder the said play from being then and there acted and performed, at and in the said theatre; to the great terror of the people, and of the persons then and there peaceably assembled and composing the audience at and in the said theatre, to the great loss, damage, and injury of the said managers of said theatre, and against the peace and dignity of the Commonwealth aforesaid.

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[1] 2 Chitt. 498, 499. Going to the theatre with intention to make a disturbance and render the performance inaudible is indictable. See similar precedents Cro. C. C. 625, (6th Ed.); Cro. C. A. 166.

309. *For riotously assembling and hanging the Effigy of a Person.*[1]

The jurors &c., upon their oath present, that C. D., E. F., and G. H., together with divers other evil disposed and riotous persons, to the number of twenty, to the said jurors yet unknown, being of unruly and turbulent tempers and dispositions, and unlawfully, wilfully, and maliciously intending to disquiet and terrify one I. J. on at &c., unlawfully, tumultuously, and riotously did assemble and meet together with intent to break and disturb the peace of said Commonwealth, and being so assembled as aforesaid, a certain wooden gallows, in the highway there, and near to the dwelling-house of the said I. J., unlawfully, tumultuously, riotously, routously, and maliciously did erect; and a certain figure, resembling a man. as and for the effigy of the said I. J., then and there unlawfully, maliciously, and riotously did hang and affix to the said gallows; and did then and there threaten the said I. J. to hang him up alive, and did then and there, for the space of three hours, make a great noise and disturbance of the peace; to the great terror of the said I. J. and of the people there and thereabouts residing, inhabiting, and being, to the great damage of him the said I. J., and against the peace and dignity of the Commonwealth aforesaid.

310. *For a Riot and pulling down an Out-House.*[2]

The jurors &c., upon their oath present, that C. D., E. F., and G. H., together with other evil disposed and riotous persons, to the number of ten, to the said jurors unknown, on at with force and arms, to wit, with sticks, staves, and other offensive weapons, did unlawfully, riotously, and routously assemble and gather together to disturb the peace of said Commonwealth; and being so assembled and gathered together, a certain building and out-house, in the possession and lawful occupation of one I. J., then and there unlawfully, riotously, and routously did pull down, remove, break, and destroy, and other wrongs then and there did; to the great disturbance and terror of the people there residing and being, to the great damage of him the said I. J., and against the peace and dignity of the Commonwealth aforesaid.

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[1] From 2 Chitt. 501, 502, note (*p*), all the defendants were convicted on this indictment.

[2] 2 Chitt. 502.

311. *For a Riot in a House, and assaulting a Lodger.*[1]

The jurors &c., upon their oath present, that C. D., E. F., and G. H., together with divers other evil disposed and riotous people, to the number of six, to the said jurors yet unknown, on the day of &c., with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully, riotously, and routously assemble and meet together to disturb the peace of the said Commonwealth, and being so assembled and met together, the dwelling-house of one I. J. there situate, then and there unlawfully, riotously, and routously did beset, break, and enter, and then and there unlawfully, riotously, and routously did make a great noise, riot, and disturbance, in the said dwelling-house, and did then and there unlawfully, riotously, and routously continue in said dwelling-house, making such noise, riot, and disturbance for the space of three hours, and thereby greatly disquieted and terrified the said I. J. and his lodgers in the peaceable possession and enjoyment of his said dwelling-house, and then and there unlawfully, riotously, and routously, in and upon one K. L., a lodger and inmate in said dwelling-house, an assault did make, and him the said K. L. then and there unlawfully, riotously, and routously did beat, wound, and abuse, so that his life was thereby greatly endangered, and thereby greatly terrified the said I. J. and his family; and other wrongs then and there unlawfully, riotously, and routously did and committed; to the great terror of the people, to the great damage of him the said K. L., and against the peace and dignity of the Commonwealth aforesaid.

312. *For riotously attacking a Dwelling-House, breaking the Windows, &c.*

The jurors &c., upon their oath present, that C. D., E. F., and G. H., together with divers others to the number of twenty, to the said jurors unknown, being evil disposed and riotous persons, and disturbers of the peace of said Commonwealth, on &c., with force and arms, to wit, with clubs, staves, stones, and other dangerous and offensive weapons, at B. aforesaid, in the county aforesaid, the dwelling-house of one I. J. there situate, in the night time, unlawfully, riotously, and routously did attack and beset, and did then and there unlawfully, riotously, routously, and outrageously make a great noise, disturbance, and affray, near to and about the dwelling-house of him the said I. J. there

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[1] 2 Chitt. 503, 504.

situate, and did unlawfully, riotously, and routously continue near to and about the said dwelling-house, making such noise, disturbance, and affray, for the space of two hours, and the windows of the said dwelling-house did then and there unlawfully, riotously, and routously, with the dangerous and offensive weapons aforesaid, break, destroy, and demolish; to the great damage, terror, and dismay of him the said I. J., and of his family, in the dwelling-house aforesaid then and there lawfully being, to the great terror of the people of said Commonwealth, and against the peace and dignity of the Commonwealth aforesaid.

313. *For riotously breaking a Dwelling-House and removing Goods.*[1]

The jurors &c., upon their oath present, that C. D., E. F., and G. H., and divers other evil disposed persons, to the number of twenty, to the said jurors as yet unknown, on &c., with force and arms, at B. aforesaid, did unlawfully, riotously, and routously assemble and meet together to disturb the peace of said Commonwealth, and being so assembled and met together, the dwelling-house of one I. J. there situate, did then and there unlawfully, riotously, and routously break and enter, and in and upon him the said I. J. unlawfully, riotously, and routously did make an assault, and him the said I. J., in his dwelling-house aforesaid, unlawfully, riotously, and routously did beat, wound, and ill treat; and did then and there, in the said dwelling-house, unlawfully, and against the will of the said I. J., stay and continue for the space of four hours, and then and there unlawfully, riotously, and routously did seize and take into their possession, and put, cast, fling, and throw divers goods and chattels, to wit, [*here enumerate the goods*,] of him the said I. J., of the value of twenty dollars, then and there in the dwelling-house aforesaid being found, from and out of the same into the public street there, and thereby greatly damaged, injured, and broke in pieces the said goods and chattels, and other wrongs then and there did; to the great terror of the people of said Commonwealth, to the great damage of the said I. J., and against the peace and dignity of the Commonwealth aforesaid.

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[1] 2 Chitt. 504. See Cro. C. A. 331, for *beginning* to demolish a house, on the statute of 1 Geo. 1, c. 5, § 4.

314. *For a Riot, in breaking into a Dwelling-House on pretence of an Execution.*[1]

The jurors &c., upon their oath present, that A. B., of &c., and five others, to the jurors aforesaid unknown, on at with force and arms, unlawfully, riotously, and routously, did assemble and gather themselves together to disturb the peace of the said Commonwealth ; and so being then and there assembled and gathered together, the said A. B., and the said five others, to the jurors aforesaid unknown, afterwards, on the same day, at aforesaid, the mansion-house of one C. D. there situate, then and there unlawfully, riotously, and routously did attack, beset, break, and enter; and the door of a chamber in which the said C. D. then was, in the mansion-house aforesaid, they the said A. B. and the said five others to the jurors aforesaid as yet unknown, then and there, unlawfully, riotously, and routously did open, break, demolish, and enter, under the pretence that the said A. B., and the five others to the jurors aforesaid as yet unknown, then and there had an execution against the said C. D. for the sum of and that the said A. B. and the said five other persons to the jurors unknown, then and there, in and upon one E. F., spinster, then and there being in the mansion-house aforesaid, did then and there, with a certain drawn sword, unlawfully, riotously, and routously make an assault, and her the said E. F. in great peril and danger of her life, then and there, unlawfully, riotously, and routously did put; and other wrongs then and there did, to the great damage of them the said C. D. and E. F., and against the peace and dignity of the Commonwealth aforesaid.

315. *Indictment for a Riot, breaking into a Room with offensive Weapons, &c., Assault and Battery in the Room, and breaking the Furniture.*[2]

The jurors &c., upon their oath present, that A. B. C. D. and E. F., together with divers other evil disposed and riotous persons, to the jurors aforesaid unknown, on at with force and arms, to wit, with cutlasses, sticks, bludgeons, and other offensive weapons, at &c. aforesaid, did unlawfully, riotously, and routously assemble and meet together to disturb the

[1] 1 Trem. P. C. 181.

[2] 2 Chitt. 502, 503: 4 Went. 151.

peace of the said Commonwealth, and being so assembled and met together did then and there unlawfully, riotously, and routously break and enter into a certain room in and part of a certain warehouse or building of one G. H. there situate; and in which said room the said G. H. and divers other persons were then and there assembled and met together, and did then and there unlawfully, riotously, and routously make a great noise, tumult, and affray in the said room, and then and there with the said cutlasses, sticks, bludgeons, and other offensive weapons, the said G. H. and divers other persons whose names are to the jurors aforesaid as yet unknown, unlawfully &c. assaulted; and the said G. H. and the said other persons then and there unlawfully &c. cut, beat, dragged about, wounded, and ill treated, so that their lives were thereby then and there greatly endangered, and then and there unlawfully &c. broke down, demolished, and destroyed the window-shutters and divers other parts of the said warehouse, and then and there unlawfully &c. broke up, tore up, broke to pieces, damaged, spoiled, and destroyed the benches, chairs, and divers other articles of the furniture and fixtures of and in the said room, and other wrongs to the said E. F. &c. then and there unlawfully, riotously, and routously did, to the great damage of the said E. F. &c., in contempt &c., to the evil and pernicious example &c., and against the peace &c.

316. *For a Riot, by twelve Persons remaining an Hour after Proclamation read.*[1]

The jurors &c., upon their oath present, that C. D., E. F., and G. H., [*additions,*] and divers other persons, to the number of twelve and more, to the jurors aforesaid as yet unknown, on the day of &c., with force and arms, at B. aforesaid, in the county aforesaid, unlawfully, riotously, routously, and tumultuously did assemble and meet together, to the great disturbance of the public peace, and that afterwards, to wit, on the said day of in the year aforesaid, at B. aforesaid, I. J., Esq., then being one of the justices of the peace in and for the said county of S., duly and legally qualified and empowered to discharge and perform the duties of that office, did then and there come, as near as he safely could, to the said C. D., E. F.,

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[1] 2 Stark. b. 42; Cro. C. A. 175; Cro. C. C. 630, (6th Ed.) The statute of Massachusetts [Stat. 1786, c. 38, § 1,] upon which this precedent is drawn, is very similar in its provisions to that of 1 Geo. 1, c. 5, § 1, 2, on which the precedents in Starkie, Cro. C. A. and others, are drawn. The words of the proclamation are, *mutatis mutandis,* the same.

and G. H., and the said other persons, to the number of twelve and more, to the said jurors unknown, being then and there so assembled to disturb the public peace as aforesaid, and with a loud voice, he the said I. J., Esq., did then and there command silence to be, while proclamation was making; and the said I. J., Esq., after that, did then and there openly, and with a loud voice, make proclamation, according to the form of the statute in such case made and provided, in these words following, that is to say, "Commonwealth of Massachusetts. By virtue of an act of this Commonwealth, made and passed in the year of our Lord one thousand seven hundred and eighty-six, entitled, an act for the suppressing routs, riots, and tumultuous assemblies, and the evil consequences thereof, I am directed to charge and command, and I do accordingly charge and command all persons, being here assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains inflicted by the said act. God save the Commonwealth." And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. D., E. F., and G. H., and said divers other persons, to the number of twelve and more, to the said jurors unknown, afterwards, to wit, on the same day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, notwithstanding the said proclamation was openly made as aforesaid, did then and there unlawfully, riotously, and tumultuously, and to the disturbance of the public peace, remain and continue together, by the space of one hour and more after such command made by the said proclamation as aforesaid; to the great terror and disturbance of all the quiet and peaceable citizens of the said Commonwealth, against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

ROBBERY. — See "Larceny and Robbery.

SABBATH-BREAKING.

The profanation of the sabbath has been punished by our English ancestors as an offence against God and religion, ever since the time of the Saxon kings; and by the fathers of New-England, ever since the settlement of the country. The excellent remarks of Sir William Blackstone, upon this subject, should be written in the heart of every American. "Besides," he observes, "the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping of one day in seven holy, as a time of relaxation and refreshment, as well as of public worship, is of admirable service in a State, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the people, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week, with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens, but which would be worn out and defaced by an unremitted continuance of labor without any stated times of recalling them to the worship of their Maker."

317. *For keeping an open Shop on the Lord's Day.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on and continually afterwards, until the day of the taking of this inquisition, at aforesaid, in the county aforesaid, was and yet is a common sabbath-breaker, and profaner of the Lord's

[1] This precedent is drawn upon the 1st section of the statute of Massachusetts of 1791, c. 58. See also 2 Chitt. 20, note (*c.*) where it is said that the offence consists in keeping open shop, not in selling the goods; cites 4 Black. 63; 1 East P. C. 5; Hawk. b. 1, c. 6, § 6; and that most acts for profaning the Sabbath, are punished summarily before magistrates.

day; and that the said A. B., on the said day of being Lord's day, and at divers other days and times, being Lord's days, during the times aforesaid, at B. aforesaid, in the county aforesaid, did keep open his the said A. B.'s shop, and did keep an open and common public shop; and in the said shop, did then and there, and on the said other days and times, being Lord's days, openly and publicly sell, and expose to sale, flesh meat, to divers persons to the said jurors unknown; to the great injury and common nuisance of all the citizens of said Commonwealth, against the peace and dignity of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided.

318. *Against a Drover for travelling and driving Droves of Cattle on the Lord's Day: On the 2d Section of the Statute.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on being Lord's day, at B. aforesaid, not regarding the duties and solemnities of the said day, nor the due observation of the same, did travel on said day, and did drive and cause to be driven, on the said Lord's day, a large collection and drove of oxen, cows, sheep, and other animals, through the public street and highway in the said town of B., and near to the places of public worship in said town, during the performance of the public worship of God in the said houses of public worship; which travelling and driving of said oxen, cows, sheep, and other animals, through the street and highway aforesaid by the said A. B., was not from necessity or mercy; to the great disturbance and annoyance of the well disposed people of the said town of B., against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

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[1] This law is totally disregarded in some parts of Massachusetts. Thirteen droves of cattle have been driven through one town in the county of Middlesex, each consisting of from one hundred and fifty to two hundred in number, *during the performance of public religious services, in the morning of one Sabbath* and within a few rods of several houses of public worship!

319. *For indecent and rude Behaviour within the Walls of a Place of Public Worship: On the 7th Section of the Statute.*

The jurors &c., upon their oath present, that A. B., of &c., being a person of rude, indecent, and irreligious habits and manners, and regardless of the duties and solemnities of the public worship of God, and of the due observation of the Lord's day, on it being Lord's day, at within the walls of a house of public worship there, and during the performance of divine service in said house, did behave rudely and indecently, by [*here set forth the rude and indecent behaviour;*] against good morals and good manners, against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

320. *For interrupting and disturbing Public Worship: On the 8th Section of the Statute.*

The jurors &c., upon their oath present, that A. B., of &c., being a person regardless of the duties and solemnities of the public worship of God, and of the due observation of the Lord's day, at B., aforesaid, in the county aforesaid, did wilfully interrupt and disturb a certain assembly of people, there met for the public worship of God within the place of their assembling, to wit, within the meeting-house, in the first parish in the said town of B., by making divers loud and indecent noises and tumults, during the performance of divine service in said meeting-house; to the great injury and insult of the orderly people then and there assembled in the said meeting-house for the purposes aforesaid, against good morals and good manners, against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

NOTE. The statute upon which these precedents are drawn, created a great number of small offences, most of which are cognizable by a justice of the peace. See 2 Chit. 20, note (*c.*)

SEPULCHRES OF THE DEAD.

321. *At Common Law, for digging up and carrying away a Dead Body out of a Church Yard.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at - the common burying ground [*or church yard, as the case may be,*] in the first parish in the said town of B., there situate, unlawfully, knowingly, and wilfully did break and enter, and the grave there, in which one C. D., deceased, had been lately before interred and then was, unlawfully, knowingly, and wilfully did dig open, and afterwards, to wit, on the same day, at said B., the body of the said C. D. out of the grave aforesaid, unlawfully, knowingly, and wilfully did take and carry away, to the great scandal to Christian burial, and against the peace and dignity of the Commonwealth aforesaid.

322. *For digging up a Human Body &c.: On the 1st Section of the Statute of Massachusetts, of February* 28, 1831.[2]

The jurors &c., upon their oath present, that A. B., of &c., on &c., at &c., knowingly, wilfully, and feloniously did dig up, remove, and convey away, and did knowingly, wilfully, and feloniously aid and assist in digging up, removing, and conveying away, a human body, and the remains thereof; he the said A. B. not being authorized by the board of health, overseers of the poor, or the selectmen in any town in this Commonwealth, [*or by the directors of the house of industry, overseers of the poor, or the mayor and aldermen of the city of Boston in said Commonwealth, if the offence was committed in that city;*] against the

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[1] See the precedents in 2 Chitt. 35; Cro. C. C. 212, (6th Ed.) See also 2 T. R. 733, 734; 2 East P. C. 652; and 4 East P. C. 465; Leach C. L. 497; 4 Bl. Com. 236; 1 Hale, 515. To arrest a dead body and thereby prevent its burial, is unlawful; 4 East, 465. See also a case of this kind referred to in Davis's Justice, 393, (2d Ed.) tried at *nisi prius,* before the late Chief Justice *Parsons.*

[2] This statute repeals the former statute of 1814, c, 175, and makes the offence a felony.

peace of the said Commonwealth, and contrary to the form of the statute thereof in such case made and provided.

323. *Against an Accessory before the Fact for digging up a Human Body: On the 2d Section of the Statute.*

The jurors &c., upon their oath present, that A. B., of &c., [*here state the offence against the principal, as in the next preceding precedent, and then go on as follows.*] And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D., of &c., on &c., at &c., before the committing the offence and felony aforesaid, in manner and form aforesaid, by the said A. B., to wit, on at in the county aforesaid, did knowingly, wilfully, and feloniously counsel, hire, and procure (abet, assist, and command) him the said A. B. the offence and felony aforesaid to do and commit; against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.[1]

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[1] Draw the indictment against the accessory after the fact, upon the second section, according to this precedent, excepting the allegation of defendant's being accessory *after* the fact; which allegation is to be as follows: "And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D., of &c., on at well knowing the said A. B. to have committed the offence and felony aforesaid, in manner aforesaid, him the said A. B. did then and there, knowingly, wilfully, and feloniously, harbor, conceal, maintain, and assist therein; against the peace &c., and contrary to the statute &c."

SODOMY AND BESTIALITY.

324. *For Sodomy, committed with a Boy.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on at in the county aforesaid, in and upon one C. D., a male child, about the age of fifteen, with force and arms, did make an assault, and then and there wickedly and diabolically did commit the crime against nature, by having a venereal affair with the said C. D., by then and there having carnal knowledge of the body of said C. D. against the order of nature; against the peace of said Commonwealth, and contrary to the form of the statute thereof in such case made and provided.

325. *For Sodomy, committed with a Beast.*

The jurors &c., upon their oath present, that A. B., of &c., on at in the county aforesaid, did commit the crime against nature, by having a venereal and carnal intercourse and copulation with a cow; and that he the said A. B. did then and there, wickedly and diabolically, and against the order of nature, have carnal copulation with said cow; against the peace of said Commonwealth, and contrary to the form of the statute thereof in such case made and provided.

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[1] On the statute of Massachusetts of 1804, c. 133, § 1. See other precedents for these detestable offences, drawn upon the statute of 25 Hen. 8, c. 6; 2 Chitt. 49, 50, note (*o.*); 2 Stark. 413; and Cro. C. C. 200, 201, (6th Ed.)

TREASON.

326. *Form of an Indictment for Treason, by levying War against the United States.*[1]

The grand inquest of the United States of America, for the Virginia district, upon their oath do present, that Aaron Burr, late of the city of New York, and state of New York, attorney at law, being an inhabitant of, and residing within the United States, and under the protection of the laws of the United States, and owing allegiance and fidelity to the said United States, not weighing the duty of his said allegiance, but wickedly devising and intending the peace and tranquillity of the said United States to disturb, and to stir, move, and excite insurrection, rebellion, and war, against the said United States, on the tenth day of December, in the year of our Lord one thousand eight hundred and six, at a certain place, called and known by the name of Blannerhasset's Island, in the county of Wood, and in the district of Virginia aforesaid, and within the jurisdiction of this Court, unlawfully, falsely, maliciously, and traitorously did compass, imagine, and intend to raise and levy war, insurrection, and rebellion against the said United States; and in order to fulfil and bring to effect the said traitorous compassings, imaginations, and intentions of him the said Aaron Burr, he the said Aaron Burr, afterwards, to wit, on the said tenth day of December, in the year aforesaid, at the said island called Blannerhasset's Island, as aforesaid, in the county of Wood aforesaid, in the district of Virginia aforesaid, and within the jurisdiction of this Court, with a great multitude of persons, (whose names to the grand inquest aforesaid are at present unknown,) to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, dirks, and other warlike weapons, as well offensive as defensive, being then and there

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[1] This is the indictment against Aaron Burr, taken from a copy of the proceedings in that case, transmitted by the President of the United States to Congress, in a message of November 23, 1807. The superfluous matter in this indictment, probably copied from the obsolete forms in the English precedents, is here omitted. There was another count in this indictment, charging the treason in the same words, with an addition, alleging an overt act, by proceeding down the Ohio, with the traitorous intention of taking possession of the city of New Orleans. See 4 Cranch, 471, 476, 481, 487, 488, for a full report of this case, and the exposition of the law of treason against the United States.

unlawfully, maliciously, and traitorously assembled and gathered together, did falsely and traitorously join and assemble themselves together, against the said United States, and then and there, with force and arms, did falsely and traitorously, and in a hostile and warlike manner, array and dispose themselves against the said United States; and then and there, on the day and in the year aforesaid, at the island aforesaid, commonly called Blannerhasset's Island, in the aforesaid county of Wood, within the said Virginia district, and within the jurisdiction of this Court, in pursuance of such their traitorous intentions and purposes aforesaid, he the said Aaron Burr, with the said persons so as aforesaid traitorously assembled, armed, and arrayed in manner aforesaid, most wickedly, maliciously, and traitorously did ordain, prepare, and levy war against the said United States, contrary to the duty of the allegiance and fidelity of the said Aaron Burr, against the constitution, peace, and dignity of the said United States, and against the form of the act of the Congress of the said United States, in such case made and provided.

327. *For levying War against the State of Massachusetts: On the Statute of* 1777.[1]

The jurors for said Commonwealth, upon their oath present, that A. B., of in the county of yeoman, on at in the county aforesaid, he the said A. B. being a person then and there abiding within the State and Commonwealth aforesaid, and deriving protection from the laws of the same; and then and there owing allegiance and fidelity to the said State and Commonwealth, and being then and there a member thereof; not regarding the duty of his said allegiance and fidelity, but wickedly devising and intending the peace and tranquillity of the said State and Commonwealth to disturb and destroy, on at in the county of in the said State and Commonwealth, unlawfully, maliciously, and traitorously did compass, contrive, conspire, and intend to raise and levy war, insurrection, and rebellion against the said State and Commonwealth, and did then and there unlawfully, maliciously, and traitorously conspire to levy war against the said State and

[1] See Appendix to the former edition of Massachusetts Laws, vol. ii. p. 1046. This statute has never been revised, as appears by the note at the end of the last section of the statue. See 2 Chitt. 83, 84. This indictment in Chitty was for the riots by Lord *G. Gordon* in 1780. See also Cro. C. A. 189; 1 Trem. P. C. 1.

Commonwealth ; and to fulfil and bring to effect the said traitorous compassings, intentions, and conspirings of him the said A. B., he the said A. B. afterwards, that is to say, on the said day of in the year of our Lord one thousand eight hundred and at aforesaid, in the county of aforesaid, and within the State and Commonwealth aforesaid, with a great multitude of other persons, whose names are to the jurors aforesaid as yet unknown, to the number of one hundred and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously, and traitorously assembled and gathered together, did falsely, maliciously, and traitorously assemble, combine, conspire, and join themselves together against the said State and Commonwealth, and then and there, with force and arms, did wickedly, falsely, maliciously, and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said State and Commonwealth ; and then and there, in pursuance of such their malicious and traitorous intentions, conspirings, and purposes, he the said A. B., and the said other persons to the jurors aforesaid unknown, so as aforesaid traitorously assembled, armed, and arrayed in manner aforesaid, most wickedly, maliciously, and traitorously did ordain, prepare, and levy public war against the said State and Commonwealth, contrary to the duty of the allegiance of the said A. B., against the peace and dignity of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

328. *For traitorously adhering to, and giving Aid and Comfort to the Enemies of the United States* [1]

The jurors &c., upon their oath present, that on &c., and long before, and continually from thence hitherto, an open and public war was, and yet is, prosecuted and carried on between the United States of America, and the persons exercising the powers of government in France ; and that A. B., late of &c., a citizen of the said United States, well knowing the premises, but not regarding the duty of his allegiance, but as a traitor against the said United States, and wholly withdrawing the allegiance, fidelity, and obedience, which every citizen of the said United States of right ought to bear towards the government and people thereof, and conspiring, contriving, and intending, by all the

[1] 2 Chitt. 68, 73 ; Gordon's Digest, 699, art. 3584.

means in his power, to aid and assist the persons exercising the powers of government in France, and being enemies of the said United States in the prosecution of the said war against the said United States, heretofore, and during the said war, to wit, on &c. aforesaid, and on divers other days and times, as well before as after that day, the said A. B., with force and arms, at &c., maliciously and traitorously did adhere to, and give aid and comfort to the said persons exercising the said powers of government in France, then being enemies of the said government of the said United States; and that in the prosecution, performance, and execution of his the said A. B.'s treason and traitorous adhering aforesaid, and to fulfil, perfect, and bring the same to effect, he the said A. B., as such traitor as aforesaid, during the said war, to wit, on &c. aforesaid, and on divers other days and times, as well before as after that day, at &c., with force and arms, maliciously and traitorously did conspire, consult, consent, and agree with one J. H. I., one W. J., and divers other false traitors, whose names are to the jurors aforesaid unknown, to aid and assist, and to seduce and procure others, citizens of said United States, to aid and assist the said persons exercising the powers of government in France, and being enemies to the United States as aforesaid, in a hostile invasion of the dominions of the said United States, and in the prosecution of the said war against the said United States;[1] contrary to the duty of the allegiance of the said A. B., against the peace and dignity of the said United States, and contrary to the form of the statute of the said United States in such case made and provided.

329. *For levying War against the United States.*[2]

The jurors &c., upon their oath present, that A. B., of &c., not weighing the duty of his allegiance, but entirely withdrawing the obedience which a true and faithful citizen of the United States of America should and of right ought to bear towards the said United States, and the government and constitution thereof; and as much as in him lay, intending to disturb the peace and public tranquillity of the said United States, on at traitorously did compass and intend to raise and levy war, rebellion, and insurrection against the said United States within

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[1] If there be any other overt act, it must be introduced immediately preceding the conclusion of the indictment, with such averments as are contained in the overt acts set forth in this indictment.

[2] Altered from a precedent in 1 Trem. P. C. 1.

the same; and to fulfil and bring to effect his said treasons and traitorous intentions aforesaid, he the said A. B., afterwards, to wit, on the said day of with force and arms, at aforesaid, in the county aforesaid, with a great multitude of other persons, to the jurors aforesaid unknown, to the number of armed and arrayed in a warlike manner, to wit, with drums, trumpets, pistols, blunderbusses, swords, guns, and other arms, as well offensive as defensive; being then and there unlawfully and traitorously assembled and gathered together against the said United States, at aforesaid, in the county aforesaid, on aforesaid, traitorously did prepare, levy, and ordain public war against the said United States; against the peace of the said United States, and contrary to the form of the statute thereof in such case made and provided.

330. *Another Precedent for Treason for levying War.*[1]

The jurors &c., upon their oath present, that G. G., of &c., being a citizen of the United States of America, not weighing the duty of his allegiance, but entirely withdrawing the due obedience which every citizen of the said United States should and of right ought to bear towards the government and constitution of the said United States; and wickedly contriving, devising, and intending to disturb the public peace and tranquillity of the said United States, on at unlawfully, maliciously, and traitorously did compass and intend to raise and levy war, insurrection, and rebellion against the said United States, and the government thereof; and in order to fulfil and bring to effect the said traitorous compassings and intentions of him the said G. G., he the said G. G. afterwards, that is to say, on with force and arms, at aforesaid, with a great multitude of persons, whose names are to the jurors aforesaid unknown, to wit, to the number of five hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with colors flying, and with swords, clubs, bludgeons, staves, and other weapons, as well offensive as defensive, being then and there unlawfully, maliciously, and traitorously assembled and gathered together against the said government of the said United States, most wickedly, maliciously, and traitorously did ordain, prepare, and levy war against the said United States, and the government thereof; against the peace and dignity of the said United States, and contrary to the form of statute thereof in such case made and provided.

[1] 2 Chitt. 83, 84. This is altered from the indictment in the case of Lord *G. Gordon*, for the riots in London in 1780. See Trem. 3; Cr. C. A. 189.

331. *Another Form of an Indictment for Treason by levying War against the United States.*[1]

The jurors &c., upon their oath present, that John Fries, late of &c., in the district of Pennsylvania, yeoman, being an inhabitant of, and residing within the said United States, to wit, in the district aforesaid, and under the protection of the laws of the said United States, and owing allegiance and fidelity to the same; but disregarding the duty of the said allegiance and fidelity, and wickedly devising and intending the peace and tranquillity of the said United States to disturb, on the day of at &c., in the district aforesaid, unlawfully, maliciously, and traitorously, did compass, imagine, and intend to raise and levy war, insurrection, and rebellion, against the said United States; and to fulfil and bring to effect the said traitorous compassings and intentions of him the said John Fries, he the said John Fries, afterwards, that is to say, on the said day of at in the district aforesaid, with a great multitude of persons, whose names to the jurors aforesaid are unknown, to the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, clubs, pistols, and other warlike weapons, as well offensive as defensive; and being then and there unlawfully, maliciously, and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States, and then and there, with force and arms, did falsely and traitorously, and in a warlike manner, to wit, with guns, swords, clubs, pistols, and other weapons as aforesaid, array and dispose themselves against the said United States, and then and there, with force and arms, in pursuance of such their traitorous intentions and purposes, he the said John Fries, with the said other persons, to the said jurors unknown, so as aforesaid traitorously assembled and armed and arrayed in manner aforesaid, most wickedly, maliciously, and traitorously did ordain, prepare, and levy war against the said United States, contrary to the duty of the allegiance of the said John Fries; against the peace of the said United States, and contrary to the form of the statute of the said United States in such case made and provided.

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[1] 2 Chitt. 84, (Riley's Ed.) This is the case of *John Fries*. See other precedents, Cro. C. A. 189; the case of Lord *G. Gordon*, 1 Trem. 1.

TRESPASS.

Indictments for trespasses, upon the statute of Massachusetts of 1785, ch. 28.

332. *For cutting down Trees growing for Ornament: On the first Section of the Statute.*[1]

The jurors &c., upon their oath present, that A. B. of &c., on the day of now last past, with force and arms, at in the county aforesaid, did unlawfully cut down and destroy two elm trees, in a certain avenue to the dwelling-house of one C. D. there planted, placed, and growing for use, shade, and ornament, on land not his own or belonging to him the said A. B., to wit, on land of the said C. D., and of which he the said C. D. was the lawful owner; he the said A. B. then and there, not having the consent therefor from the said C. D., the owner of said land; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

333. *Against a person for throwing down and leaving open Bars, inclosing Land not his own: On the first Section of the Statute.*

The jurors &c., on their oath present, that A. B., of &c., on at in the county aforesaid, with force and arms, did unlawfully throw down certain bars, being part of a fence belonging to and enclosing a certain piece and parcel of land there situate; and did then and there unlawfully leave open the same bars; the said land, which was then and there inclosed by the fence and bars aforesaid, then and there belonging to one C. D., and not to him the said A. B., and was not the said A. B.'s own land, and in which he the said A. B. had no interest; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.[2]

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[1] See similar precedents on the statute of 9 Geo. 1, c. 22, in 2 Stark. 551, and 3 Chitt. 1116, in which the offence is charged as a *felony!* By the statute of Massachusetts, the offence is punished by a fine, of not less than five nor more than forty shillings!

[2] The same form will answer for throwing and leaving open "gates"; or for injuring, marring, and defacing any fence; using the precise words of the statute descriptive of the particular offence.

334. *Against a Person for digging up and carrying away Stones and Gravel, on Land not his own: On the first Section of the Statute.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully dig up, and carry away, a certain large quantity, to wit, ten cart-loads, of stones and gravel, in which he the said A. B. then and there had no interest, and which was then and there lying and being on land not his own, but on the land of one C. D.; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

335. *Against a Person for carrying away Goods from a Wharf (or Landing-place), whereof he was not a Proprietor: On the first Section of the Statute.*

The jurors &c., upon their oath present, that A. B., of &c., on with force and arms, at aforesaid, in the county aforesaid, did unlawfully take and carry away certain goods, of the value of to wit, [*here describe the goods taken away*] from a certain wharf (or landing-place) there situate, called wharf; he the said A. B. then and there not being a proprietor or owner of said wharf (or landing-place), in which said goods &c., taken and carried away as aforesaid, he the said A. B. then and there had no interest; and said goods being taken and carried away, as aforesaid, by him the said A. B., without leave of any person who had interest therein; against the peace of said Commonwealth, and contrary to the form of the statute, &c.

336. *Against a Person for breaking the Glass in a Building not his own: On the first Section of the Statute.*

The jurors for said Commonwealth, on their oath present, that A. B., of &c., on with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully and wilfully break and destroy the glass, to wit, ten panes of window-glass, in a certain building there situate, not his own; but which building then and

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[1] The same form will answer for digging up &c. ore, clay, sand, turf, or mould, roots, fruit, or plants; or for cutting up and carrying away any grass, hay, or corn, as mentioned and described in the same part of the first section of the statute.

there belonged to, and was the property of one C. D.; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

137. *For wilfully breaking and defacing a Mile-stone: On the second Section of the Statute.*

The jurors &c., upon their oath present, that A. B., of &c., on with force and arms, at B., in the county aforesaid, a certain mile-stone, placed and put up in a public road there, for public convenience, and the information of travellers, did unlawfully and wilfully break, deface, and destroy; he the said A. B. not being then and there legally authorized so to do; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

338. *For cutting down Trees secretly in the Night time: On the third Section of the Statute.*[1]

The jurors &c., upon their oath present, that A. B., of &c., on with force and arms, at in the county aforesaid, did unlawfully, secretly, and in the night time, cut down and destroy two elm trees, in a certain avenue to the dwelling-house of one C. D., there planted, placed, and growing, for use, shade, and ornament; on land not his own, or belonging to him the said A. B., to wit, on the land of one C. D., and of which he the said C. D. was then and there the lawful owner; he the said A. B. not having the consent therefor from him the said C. D., the lawful owner of said land; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

339. *Forms of Indictments upon the additional Act of Massachusetts, for preventing Trespasses, of* 1818, *Ch.* 3, § 2.

The jurors &c., upon their oath present, that A. B., of &c., on at having entered upon a certain garden belonging to one C. D., there situate, and in his the said C. D.'s possession, did then and there unlawfully and wrongfully take therefrom a certain quantity of fruit, to wit, [*here describe the quantity and kind of fruit,*] without the permission of the said C. D., the

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[1] This third section of the statute is applicable to all the offences before mentioned, when committed secretly, or in the night; and when thus committed, the fine is to be recovered by indictment.

owner thereof; which fruit was then and there cultivated in the said garden, for the use of the owner, the said C. D.; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

340. *For breaking and injuring Trees and Shrubs: On the third Section of the Statute of* 1818, *Ch.* 3.

The jurors &c., upon their oath present, that A. B., of &c., on at having entered upon an orchard there situate, belonging to and in the possession of one C. D., and being entered upon and into said orchard as aforesaid, did, without the permission of the said C. D., the owner thereof, and with intent to injure him the said C. D., unlawfully and wantonly break, bruise, cut, mutilate, injure, and destroy a large number, to wit, ten fruit trees, then and there cultivated in said orchard, for the use of the said C. D., the said owner, and which were then and there in the orchard aforesaid standing and growing; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

341. *For entering on Grass-land, and carrying away Hay: On the second Section of the Statute of* 1818, *Ch.* 3.

The jurors &c., upon their oath present, that A. B., of &c., on at having entered on a certain piece of grass-land, belonging to one C. D., containing four acres, there situate, and in the possession of the said C. D., did then and there unlawfully and wrongfully take therefrom a certain quantity of grass, to wit, three tons of grass, of the value of fifty dollars, without the permission of the said C. D., the owner thereof; which grass had been raised, cultivated, and grown, upon the grass-land aforesaid, for the use of the said C. D., the lawful owner thereof; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

342. *For committing any of the Trespasses mentioned in the foregoing Act of* 1818, *c.* 3, *on the Lord's Day: On the fourth Section of the Statute.*

The jurors &c., upon their oath present, that A. B., of &c., on it being Lord's day, at having entered upon a certain garden belonging to one C. D., there situate, and in his the said C. D.'s possession, did then and there, on the said Lord's day, unlawfully and wrongfully take therefrom a certain

quantity of fruit, to wit, [*here insert and describe the nature and quantity of the fruit,*] without the permission of him the said C. D., the owner thereof; which fruit was then and there cultivated in the said garden, for the use of the owner, the said C. D., and was taken away on the Lord's day, as aforesaid, by him the said A. B.; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

343. *For committing a Trespass mentioned in the Act of* 1818, c. 3, *in the Night time: On the fourth Section of the Statute.*

The jurors &c., upon their oath present, that A. B., of &c. on in the night time of said day, that is to say, between sunsetting and sunrising of said day, at having entered upon a certain garden belonging to one C. D., there situate, and in his the said C. D.'s possession, did then and there, in the night time, between sunsetting and sunrising of the said day, unlawfully and wrongfully take therefrom a certain quantity of fruit, to wit, [*here state the nature and quantity of said fruit,*] without the permission of him the said C. D., the owner thereof; which fruit was then and there cultivated in the said garden, for the use of the owner, the said C. D., and was taken by the said A. B. in the night time, between sunsetting and sunrising as aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

NOTE. By the 4th section of the statute, trespasses committed on the Lord's day, or between sunsetting and sunrising, in the night time, are liable to double penalties and forfeitures. The offences in the first section of the Act are cognizable by justices of the peace; no precedent is therefore given for them. The penalties and forfeitures in the 2d and 3d sections of this statute, are to be recovered by indictment, or information in the Court of Common Pleas; the commencement of which is limited to one year from the time the offence was committed.

The foregoing forms may be adopted for all the other offences created by the statute.

USURY.

341. *Form of an Indictment for Usury.*[1]

The jurors &c., upon their oath present, that on one A. B., of &c., did lend to one C. D. the sum of dollars, and that the said C. D., for the security of the payment of said sum of dollars, with lawful interest for the same, to the said A. B. afterwards, to wit, on the day of at in the county aforesaid, did give and deliver to the said A. B. a certain promissory note, bearing date the day and year last aforesaid, by which said note the said C. D. did promise to

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[1] This precedent is drawn on the statute of Massachusetts of 1783, c. 55, which is copied nearly *verbatim* from 12 Ann. c. 16. See similar precedents in 2 Chitt. 548, 549; 1 Trem. P. C. 269; Cro. C. C. 692, (6th Ed.) See note (*r*) in the above mentioned precedent in 2 Chitt. and the authorities and remarks therein upon the nature of the offence.

The statute of Massachusetts, for the restraining of the taking of excessive usury, is nearly *verbatim* with 12 Ann. c. 16. No mode is pointed out in the statute of 12 Ann for the recovery of its penalties. The statute of Massachusetts provides that its penalties shall be recovered by indictment, or action of the case; one moiety to the Commonwealth and the other to the prosecutor; and there is a *proviso* in the last mentioned statute, "that nothing in this act shall extend to the letting of cattle, or other similar usages among farmers; or to maritime contracts among merchants; as bottomry, insurance, or course of exchange, as hath been heretofore accustomed."

To constitute the offence, three things must occur: 1. A contract between the parties. 2. Monies or other things lent. 3. Above the rate of legal interest *actually received* by the lender for forbearance. Hawk. b. 1, c. 28, § 8, note (1.) In the case of *The Commonwealth* v. *Cheney*, reported in 6 Mass. R. 348, no person can be held to bail before a magistrate in Massachusetts for the offence of usury. The reasons for this opinion are given by Chief Justice *Parsons* in delivering the opinion of the court in that case, to which the reader is referred.

By a subsequent statute of Massachusetts of 1788, c. 12, made for the limitation of actions upon penal statutes, all prosecutions for penalties created by this statute, if the suit be by action *qui tam*, are limited to one year, and to two years, if it be by indictment.

It was anciently considered unlawful for a Chistian to take any kind of usury; and whoever was guilty of it, was liable to be punished by the censures of the church; and that, *if after death* a person was found to have been a usurer while living, all his chattels and lands were forfeited! Hawk. b. 1, c. 32, § 4, who cites 3 Inst. 151; 2 R. Abr. 800; 2 Inst. 506.

pay to him the said A. B., or his order, the sum of with lawful interest for the same, in six months after the date of the same note; and that the said A. B., afterwards, to wit, on at aforesaid, unlawfully, unjustly, and corruptly did receive, accept, and take, of and from the said C. D., the sum of dollars and cents, of the monies of him the said C. D., and by way of corrupt bargain and loan, for the forbearing and giving day of payment of the said sum of from the said day of until the said day of which said sum of so as aforesaid received and taken by the said A. B. for the forbearing and giving day of payment of the said sum of from the said day of until the said day of did exceed the rate of six dollars for the loan of one hundred dollars for the year; against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

INFORMATIONS IN CRIMINAL CASES.

Form of an Information in a Criminal Case.[1]

Commonwealth of Massachusetts.

Middlesex ss. At the Supreme Judicial Court begun and holden at within and for the county of Middlesex on the Tuesday of in the year of our Lord one thousand eight hundred and

Be it remembered, that P. M., Esq., Attorney General of the said Commonwealth, [*or the Solicitor General, if he be the officer who files the information,*] being present here in court, on behalf of the said Commonwealth, gives the said Court to understand and be informed, that C. D., of &c., on &c., [*here describe the offence with the same technical accuracy as in an indictment; and conclude each count the same as in an indictment. If there be several counts, commence each as follows:*] And the said Attorney [*or Solicitor*] General, who prosecutes as aforesaid, further gives the court here to understand and be informed, that the said C. D., on &c., at &c., [*state the offence as in a second count in an indictment, and conclude the whole as follows:*] Whereupon the said Attorney [*or Solicitor*] General, who prosecutes for the said Commonwealth as aforesaid, prays the consideration of the court in the premises; and that due process of law may be awarded against the said C. D. in this behalf; and that he may be held to answer to the said Commonwealth,

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[1] 2 Chitt. 6; 2 Lord Raym. 1461. See form of 2d count, Lord Raym. 1462.

touching and concerning the premises aforesaid, and do therein what to law and justice shall appertain.[1]

P. M., *Attorney General of Massachusetts.*

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[1] There is no variance in the general form of an information in criminal cases. The frame of it must of course be the same in all cases where it will lie, as for the prosecution of a misdemeanor of any description. When you have proceeded as far as the words, "gives the court to understand and be informed," nothing is necessary but to turn to the precedents of indictments, and take the allegations and descriptions of the offence you are about to prosecute, and transfer them into the information; for the same technical accuracy is required in an information as in an indictment.

For these reasons, it is not necessary to add the mere skeletons of informations in criminal cases to this collection. This mode of prosecuting crimes is not, in my apprehension, either congenial or consistent with the nature of our government and institutions. If the practice were restricted to corporations, it might not be objectionable. But if it were extended here, either in law or practice, as it is in England, to every species of crime excepting treason, misprision of treason, and felony, the protection of the innocent from groundless and malicious prosecutions, which we think we derive from the institution of grand juries, might be endangered. The instructions which are given by our judges in their charges to the grand jury to accuse no one without full and satisfactory evidence of his guilt, is one of the most admirable features in the administration of public justice. The institution of grand juries has existed in England for nearly a thousand years, and in this country ever since its settlement.

The power of the attorney general in England, in regard to the prosecution of crimes by information, would be viewed with great jealousy in this country. He is the sole judge of what public misdemeanors he will prosecute. 1 Chitt. 845; 4 Bl. Com. 312, Bac. Abr. *Information*, A. He may file an information against any one whom he thinks proper to select, without oath, without motion, or opportunity for the defendant to show cause against the proceedings. Id. Ibid. Nor is he in any case liable to an action for a groundless or malicious prosecution. 1 Chitt. 846; 1 T. R. 514, 535. So independent is his authority, that the court will not quash his information on the motion of the defendant; but will compel him to plead or demur. 1 Salk. 372; Bac. Abr. *Information*, A.; 1 Chitt. 847. The information, being a mere assertion of the officer who files it, may be amended at any time before trial, without the consent of the defendant. These amendments may be very extensive and material; counts may be struck out, and new ones inserted. 1 Chitt. 868; 4 Burr. 2528. Power to this extent, concentrated in a single individual, and that individual not only the officer, but the *minister of the government* which he serves, would not be endured in this country.

What is the extent of the power of a public prosecutor under our constitution of government has never, to my knowledge, been tested.

There is a general rule stated in 5 Mass. R. 257, which is to this effect: "that

INFORMATIONS QUO WARRANTO.

Commonwealth v. *John Breed.*[1]

To the Honorable the Justices of the Supreme Judicial Court, begun and holden at Boston, within the county of Suffolk, on the first Tuesday of March, in the year of our Lord one thousand eight hundred and twenty-six, and continued by adjournment to Tuesday, the eighteenth day of July then next following.

Be it remembered, that Daniel Davis, Solicitor General of the Commonwealth of Masachusetts, comes into Court and brings with him here into Court a certain resolve of the General Court of said Commonwealth, passed on the twenty-sixth day of January, in the year of our Lord one thousand eight hundred and twenty-six, containing, among other things, the following:

"Resolved, that the Solicitor General be instructed to commence proper process in the Supreme Judicial Court, to ascertain whether the proprietors of the bridge from Belle Isle to Chelsea, have forfeited their right to maintain the same."

Whereupon the said Solicitor General, by virtue of the power and authority and in pursuance of said resolve, gives the said Court here to understand and be informed, that there is, and immemorially hath been, a certain arm of the sea, extending from the open harbour of the city of Boston, in the county of Suffolk, towards and unto the town of Chelsea in the county of Suffolk, and running by the shores of the said town of Chelsea, and bounding northwardly and northwestwardly on said shores, up to certain mills, landing places, and marshes in said town situate, and separating the shores of the town of Chelsea from the westwardly shores of a certain island called Belle Isle, lying southeastwardly from said town, and that the said arm of the sea is flowed and reflowed by the tides; and is, and has been, from time immemorial, an open and common highway for all citizens of this Commonwealth to pass and repass with their

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all public misdemeanors which may be prosecuted by indictment, may be prosecuted by information, in behalf of the Commonwealth; unless the prosecution be restrained by the statute to indictment." There may be such a rule; but I confess I have never met with it in the course of long official experience; and if it exists, I should doubt its applicability to the principles and policy of our government.

[1] 4 Pick. 460.

boats, barges, lighters, sloops, schooners, and other vessels, loaded and unloaded, at all times, at the will and pleasure of said citizens; and has been so used and enjoyed by such citizens and all other persons having occasion to pass. And that one John Breed of Boston, in the county of Suffolk, merchant, well knowing the premises, but intending to impede such passing, and to prevent such immemorial use of the said highway, as an arm of the sea as aforesaid, did, with such intent, at said Chelsea, on the first day of October, in the year of our Lord one thousand eight hundred and twenty-four, erect, build, keep up, and maintain, a certain bridge, constructed of wood, from said island called Belle Isle, in, across, and upon said arm of the sea, to the shores of the town of Chelsea aforesaid, and still doth keep up and maintain the same bridge; whereby the said arm of the sea and common and ancient highway hath been, and yet is, obstructed and stopped up, so that the said citizens and others who have occasion through the same to pass with their vessels as aforesaid, have been and still are obstructed and hindered, and prevented from passing and repassing and sailing in and with said boats, barges, and vessels, in and along said arm of the sea and common highway, as they otherwise could and lawfully might do; and that said John Breed hath usurped, and still doth usurp upon the government of the said Commonwealth, to have and maintain the said bridge; to the great damage and prejudice of the rights of the said Commonwealth, and of the citizens thereof.

Whereupon the said Solicitor General prays the advice of the Court here in the premises, and for due process of law against the said John Breed in this behalf to be made, to answer to the said Commonwealth, by *what warrant* he claims to have and maintain and keep up the bridge aforesaid, in, across, and upon the said arm of the sea and common and ancient highway.[1]

DANIEL DAVIS, *Solicitor General.*

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[1] An information in the nature of a *quo warranto* may be filed in any county where the court is in session; but the process must be made returnable to, and tried in the county where the respondent lives. *Commonwealth* v. *Smead,* 11 Mass. R. 74.

An information resembles not only an indictment, in the correct and technical description of the offence, but also an action *qui tam*, in which the informer must show the forfeiture and its appropriations. *Commonwealth* v. *Messenger*, 4 Mass. R. 465.

It is a general rule, that all public misdemeanors which may be prosecuted by indictment, may be prosecuted by information in behalf of the Common-

Plea to the foregoing Information.

And now the said John Breed comes and defends, when, where, &c. And having heard the said information read, says, that under color of the premises contained in the said information he is greatly troubled, and this by no means justly; because, protesting that the said information and the matters therein contained are not sufficient in law, and that he need not, nor is he obliged by the law of the land, to give any answer thereto, yet for plea in this behalf the said Breed says, he does not apprehend that the said Solicitor General should or ought to have, or prosecute his said action against him, because he says, that the legislature of the Commonwealth of Massachusetts, at their session holden in the month of June, in the year of our Lord one thousand eight hundred and sixteen, and on the nineteenth day of said month, passed an act in the following words to wit:

"*An Act to authorize John Breed to build a Bridge from Belle Island to Chelsea.*

"Sect. 1. Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, that John Breed of Boston (the proprietor of Belle Island), and his heirs and assigns be, and they hereby are authorized and empowered to build and keep in repair at all times, a bridge convenient for the accommodation of the proprietors of Belle Island, from the westerly part of the said island to the head land in Chelsea, at a point in the farm of Samuel Cary, Esq. late of said Chelsea, deceased.

"Sect. 2. Be it further enacted, that said bridge shall be built with a draw, not less than fifteen feet wide, made of suitable materials, and conveniently placed for the accommodation of such vessels as may have occasion to pass between said island and Chelsea. And the owner or owners, proprietor or proprietors of said bridge, at his and their own expense, shall, at all times when necessary, have said draw raised for the convenient passing of vessels through the same; and in case any vessel

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wealth, unless the prosecution is restrained by the statute to indictment. (*qu.*) *Commonwealth* v. *Inhabitants of Waterborough*, 5 Mass. R. 257.

In informations on penal statutes, for forfeitures incurred by malfeasance, against two or more persons, charging them all with the malfeasance, on *not guilty* pleaded, the jury may convict some, of the whole or of part of the offence charged, and may acquit others; for the malfeasance in the information is several, as well as joint; and each defendant incurs a forfeiture in proportion to his own offence. *Hill et ux.* v. *Davis et al.*, 4 Mass. R. 140.

about to pass said bridge shall be detained at the draw more than one hour, the proprietor or proprietors of said bridge shall forfeit and pay to the owner or owners of such vessel, a sum not less than three dollars, nor more than ten dollars ; to be recovered by action of debt in any court proper to try the same ; and shall also be liable to pay all damages which the owner or owners of such vessel shall or may sustain by reason of such detention, to be recovered in an action of the case in any court proper to try the same ; and if said John Breed, his heirs and assigns, shall, for the space of three years from the passing of this act, fail or neglect to erect said bridge, then this act shall be null and void, and if the said bridge shall be erected within said term of three years, then the legislature reserve the right to repeal this act, after the expiration of twenty years from the time of passing the same."

And the said John Breed further saith, that immediately, and within three years after the passing of said act, he did proceed to erect, build, and finish a bridge convenient for the accommodation of the proprietors of Belle Island, from the westerly part of said island, to the hard land in Chelsea, at a point in the farm of Samuel Cary, Esq. late of said Chelsea, deceased, and that he has at all times kept the same in repair. And the said John Breed further saith, that the said bridge was built with a draw not less than fifteen feet wide, made of suitable materials, and conveniently placed for the accommodation of such vessels as had occasion to pass between said island and said Chelsea ; and that he, the said Breed, has, at his own expense, at all times when necessary, had the said draw raised, for the convenient passing of vessels through the same. And the said Breed further saith, that he has at all times conformed to the law in respect of said bridge, and observed, done, and performed all and singular the things he was bound to observe, do, or perform by force of said act, or the laws of this Commonwealth, in respect of said bridge, and that the said bridge by him made in conformity to the said act, as aforesaid, is the same bridge that is complained of in the information aforesaid ; and that he the said Breed did rightfully, and according to the provisions of law, said act, and the power and privilege thereby granted him, erect, build, keep up, and maintain the said bridge, as well and lawfully he might do. All and singular of which matters above in pleading alleged, the said Breed is ready to verify and prove to this Court. Wherefore he prays judgment, that the franchise and privileges by him claimed and exercised as aforesaid, may be allowed and adjudged to him, and that he

may be dismissed and discharged of and concerning the premises in the said information stated and contained.[1]

Information, quo warranto, against S. F., Esq. for exercising the Office of Judge of Probate, without Warrant.[2]

[*State in the caption the name of the county, the court, and the time of holding it, and then proceed.*]

Be it remembered, that Daniel Davis, Solicitor General of said Commonwealth, comes into Court, in his proper person,

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[1] There was a replication to this plea, which is not here inserted. The material facts alleged in the plea were not denied, and the proceedings ended in a special verdict, in which all the facts in the case were found. It was afterwards argued, and decided in favor of the respondent. The case is reported in 4 Pick. 460, 464, 465, in which the Court state, in conclusion, that the respondant "has not forfeited his right, by any misuser of it."

[2] This case is reported in 10 Mass. R. 290. In this case the following points were decided.

1. That where an information in the nature of a *quo warranto* recites an order of the House of Representatives, requesting the Solicitor General to file such information, and he stated that he filed the same by virtue of the authority of, and in compliance with the said order, the Court refused to quash the information, as not duly filed; considering that it was, notwithstanding such recital and statement, filed by the Solicitor General *ex officio*.

2. That an information *quo warranto* lies as well against officers appointed by the supreme executive authority of the Commonwealth, as against those holding corporate offices or franchises.

3. That the Attorney and Solicitor General have full authority to file an information of this kind by virtue of the general powers of their offices, without any interposition of the legislature; and that an information for the purpose of dissolving a corporation, whether created by charter, under the seal of the Commonwealth, or by statute of the legislature, may be prosecuted under the authority of the legislature, or by the Attorney or Solicitor General, acting *ex officio* in behalf of the Commonwealth.

4. That the Supreme Court have jurisdiction of all informations *quo warranto*, whether for dissolving corporations, or for removing persons from any office, which they claim to hold, and in whatever cases such information lies.

An information *quo warranto* lies against those only who claim to exercise some public office or authority. *Commonwealth* v. *Dearborn et al.*, 15 Mass. R. 125.

The Court refused to award an information *quo warranto* against an officer holding an election for a year only; because, by the organization of the terms of the Court, they could not come to a decision of the question, until a year had expired. *Commonwealth* v. *Athearn*, 3 Mass. R. 285.

An information for the purpose of dissolving a corporation, or of seizing its

and brings with him into said Court a certain order of the House of Representatives of said Commonwealth, which is in the words following, that is to say:

"In the House of Representatives, February 4, 1813,

"Ordered, that the Attorney or Solicitor General of the Commonwealth be requested to file informations in the nature of a *quo warranto*, to know by what authority the Hon. Samuel Fowler exercises the office of Judge of Probate of Wills &c. in the county of Hampden, and also Chief Justice of the Court of Sessions in said county; and also by what authority" [*divers other persons, naming them, exercise sundry offices in said county*]. Whereupon the said Solicitor General, by virtue of the power and authority of, and in compliance with said order of the House of Representatives, and of the request therein contained, gives the said Court to understand and be informed, that Samuel Fowler, of Westfied, in the said county of Hampden, Esq. for the space of six months now last past, hath used and exercised, and still doth use and exercise, the office of Judge of Probate of Wills and granting administrations upon intestate estates, in the said county of Hampden, without any warrant, or lawful authority therefor: which said office, and the powers, authorities, and emoluments to that office appertaining, the said Samuel Fowler, Esq. during all the time aforesaid, hath usurped, and still doth usurp, upon the government of the said Commonwealth; to the great damage and prejudice of the lawful authority thereof.

Whereupon the said Solicitor General prays the advice of the

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franchises, whether created by charter or by a statute of the legislature, may be prosecuted under the authority of the legislature, to be exercised in each particular case, or by the Attorney or Solicitor General, acting *ex officio* in behalf of the Commonwealth, and can be prosecuted in no other way. *Commonwealth* v. *Union Ins. Co. in Newburyport*, 5 Mass. R. 230.

If a person be appointed to a public office by the governor, when there is no such office in existence, and he claims to hold it by virtue of such appointment, after the office has been created, he may be removed upon information *quo warranto*. *Commonwealth* v. *Fowler*, 10 Mass. R. 300.

As where the legislature passed an act, erecting a number of towns into a new county, and provided that the act should be in force after a particular day, but made no provision for appointments to office within such county, before the act came into operation, it was held that such appointments, before the act came into operation, were unconstitutional and void; and that persons claiming to hold offices under such appointments were liable to be removed upon information *quo warranto*. *Commonwealth* v. *Fowler*, 10 Mass. R. 300.

Court here in the premises; and for due process of law against the said Samuel Fowler, Esq, in this behalf to be made and ordered, to answer to the said Commonwealth, by WHAT WARRANT he claims to have, use, exercise, and enjoy the aforesaid office.

DANIEL DAVIS, *Solicitor General.*

To this information, after a motion to quash it, which was overruled, the respondent filed the following plea.

That heretofore, on and before he exercised or assumed to exercise the said office of Judge of Probate of wills &c., he was duly and legally nominated and appointed to the same office, by his Excellency, Elbridge Gerry, Esq., then and long afterwards Governor of the said Commonwealth of Massachusetts, by and with the advice of council; and was duly commissioned thereto, as by the commission signed by the said governor, and attested by the secretary of the Commonwealth, with the great seal of the Commonwealth affixed thereto, which the said Samuel Fowler brings here into Court, for the inspection of the Court, is manifest and appears.

And the said Samuel avers, that after he was so appointed and commissioned as aforesaid, and before he entered on the discharge of the business of said office, *viz.*, on the third day of May in the same year, he took and subscribed the declaration of oaths prescribed by the constitution of said Commonwealth, and the laws of the United States, to be taken and subscribed by any person appointed or commissioned to any judicial, executive, military, or other office under the government, before his Honor, William Gray, Esq., then being Lieutenant Governor of said Commonwealth, and then being duly authorized to administer the same, as by the certificate of the said Lieutenant Governor, on the same commission, is manifest and appears. Without this, that the said Samuel usurped upon the said Commonwealth, as in and by the said information above is supposed. All which the said Samuel is ready to verify. Wherefore he prays judgment &c.

To this plea, the Solicitor General demurred generally; and the respondent joined in demurrer. It was argued and finally decided in favor of the government.

Form of a Judgment upon an Information in the Nature of a Quo Warranto: Entered by Order of Court in the Case of The Commonwealth v. *Fowler.*[1]

"It is considered by the Court here, that S. F., Esq., do not, in any manner, intermeddle or concern himself in and about the holding of, or exercising the said office of judge of probate of wills and granting administration on the estates of persons deceased, in the said county of Hampden, in the said information specified, in virtue of the said supposed commission by him mentioned in his plea in bar aforesaid; but that the said S. F., Esq., be absolutely forejudged and excluded from holding and exercising the same office; and that the said Commonwealth recover costs, taxed at," &c.

The People of the State of New York, ex relatione, *The Attorney General, against The Utica Insurance Company.*[2]

Be it remembered, that [*here state the caption of the information according to the form in the court where it is to be used.*]

Martin Van Buren, Attorney General of the people of the State of New York, who sues for the said people in this behalf, comes here before the justices of the people of the state of New York, of the Supreme Court of Judicature of the same people, on at and for the said people gives the said court here to understand and be informed, that the Utica Insurance Company, for the space of six months now last past, and more, have used, and still do use, without any warrant, charter, or grant, the following liberties, privileges, and franchises, to wit, that of becoming proprietors of a bank or fund, for the purpose of issuing notes, receiving deposits, making discounts, and transacting other business which incorporated banks may and do transact by virtue of their respective acts of incorporation. And also that of actually issuing notes, receiving deposits, making discounts, and carrying on banking operations, and other monied transactions, which are usually performed by incorporated banks, and which they alone have a right to do; of all

[1] 11 Mass. R. 339. See also 10 Mass. R. 290.

[2] 15 Johns. R. 35.

which liberties, privileges, and franchises aforesaid, the said Utica Insurance Company, during all the time aforesaid, have usurped, and still do usurp upon the said people; to their great damage and prejudice. Whereupon the said Attorney General of the people, prays advice of the said court in the premises, and due process of law against the said Utica Insurance Company, in this behalf to be made, to answer to the said people, by *what warrant* they claim to have, use, and enjoy the liberties, privileges, and franchises aforesaid.[1]

The Plea.

And now at this day, to wit, on come the said Utica Insurance Company, by Nathan Williams, their Attorney, and having heard the said information, complain, that they are, by color thereof, grievously used and disquieted, and this unjustly; because, protesting that the said information and the matters therein contained are insufficient in law; to which information the said Utica Insurance Company are not bound by the law of the land to answer; yet for plea in this behalf, the said Utica Insurance Company say, that by a certain act of the legislature of the people of this State, passed on the 29th day of March, 1816, they, the said Utica Insurance Company, were constituted and declared to be, from the passing of the said act, until the 1st Tuesday of July, A. D. 1836, a body politic and corporate in fact and in name, and by the name of "The Utica Insurance Company." And the said Utica Insurance Company further say, that by force of the said act of the said legislature, and the provisions thereof, they still continue to be, and are, a body politic and corporate, in fact and in name, and are entitled to do all lawful acts, and to enjoy all the rights, privileges, franchises, and immunities allowed to them, or conferred on them, by the act aforesaid, or by the law of the land. By virtue whereof, the said Utica Insurance Company, for all the time in the said information mentioned, have used, and still do use, the rights, liberties, privileges, and franchises of becoming proprietors of a bank or fund, for the purpose of issuing notes, receiving deposits, making discounts, and transacting other business, which incorporated banks may do and transact by virtue of their acts of incorporation, by investing in the said bank and business the funds of the said Utica Insurance Company, which the business of insurance, in said act mentioned, did not actively employ; and

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[1] See note (1) at the end of the following plea.

the said Utica Insurance Company have, during all the said time, used, and still do use, the liberties and privileges of actually issuing notes, other than notes which grant or stipulate to pay annuities upon any life or lives; and of actually issuing notes, receiving deposits, making discounts, and carrying on banking operations, and other monied transactions, which are usually performed by incorporated banks. [*The defendants then go on to traverse every fact alleged in the information; and traverse the whole, by denying that they have usurped the liberties, privileges, and franchises upon the people; and pray for what is tantamount to being metamorphosed from an insurance company, into a bank.*][1]

[To this plea, the Attorney General very naturally demurred, and the Court, still more naturally, adjudged it bad.]

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[1] In this case the court decided, among other things,

1. That an information in the nature of a *quo warranto* lies against an incorporated company, for carrying on banking operations, without authority from the legislature.

2. An information in the nature of a *quo warranto* for usurping a franchise, needs show no title to the people in the franchise; but it lies with the defendant to show his warrant for exercising it.

3. A thing within the intention, is as much within the statute, as if it were within the letter; and a thing within the letter, is not within the statute, if contrary to the intention of it.

4. A statute restraining any *person* from doing certain acts, applies equally to corporations or bodies politic, although not mentioned.

5. An act to incorporate an insurance company does not authorize the company to institute a bank; and if they do, they usurp a franchise; and on an information in the nature of a *quo warranto* being filed, judgment of ouster will be rendered against them.

PLEADINGS IN CRIMINAL CASES.

It remains to add to this collection the several pleas in use in criminal prosecutions. These are, — Pleas to the Jurisdiction of the Court; Pleas in Abatement; and Special Pleas in Bar; Replications, Demurrers, and Joinder in Demurrers; Certiorari; Writ of Error, and Writs of Habeas Corpus.

Plea to the Jurisdiction of the Court.

And the said C. D. in his proper person comes into Court here, and having heard the said indictment read, saith, that the Court here ought not to take cognizance of the offence in the said indictment above specified; because, protesting that he is not guilty of the same, nevertheless the said C. D. saith [*proceed here to state the matter of the plea;*] and this the said C. D. is ready to verify. Wherefore he prays judgment, if the court here will or ought to take cognizance of the indictment aforesaid; and that he may be discharged, and permitted to go without day.

Replication to the above Plea.

And hereupon the said Attorney General, on behalf of the said Commonwealth, says, that notwithstanding any thing by the said C. D. above in pleading alleged, this Court ought not to be precluded from taking cognizance of the indictment aforesaid, because he says, [*here state the matter of the replication, concluding to the country, or with a verification, as the replication may require;*] wherefore he prays judgment, that the said C. D. may be held to answer to said indictment.

Plea in Abatement for a Misnomer.

And now James Long, who in this indictment is called and indicted by the name of George Long, in his proper person comes into Court here, and having heard this indictment read, saith that his name is James; that he was baptized by the name of James; and that by the Christian name of James hath always since his baptism hitherto been known and called; without this, that he the said James Long, now is, or hitherto hath been,

called or known by the said name of George, as by the said indictment is supposed; and this the said James Long is ready to verify; wherefore he prays judgment of said indictment, and that the same may be quashed.[1]

Replication to the Plea of Misnomer.

And hereupon the said Attorney General, on behalf of said Commonwealth, saith, that the said indictment, by reason of any thing by the said James Long in his plea aforesaid above alleged, ought not to be quashed; because he saith, that the said James Long was, long before, and at the time of the preferring of said indictment, and still is, known as well by the name of George Long, as by the name of James Long; and this the said Attorney General for the said Commonwealth prays may be inquired of by the country.[2]

PLEAS IN BAR, IN CRIMINAL CASES.

Special pleas in bar go to the merits of the prosecution, and give a reason why the party ought not to answer at all. These are of three kinds, namely, a Former Acquittal; a Former Conviction; and a Pardon.[3] The plea of a Former Attainder is not known in this country.

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[1] It is usual, but not essential, that the plea should state that defendant was baptized by such a name. Alleging that it is his name, and that by that name he has always been called and known, is sufficient. 6 Mod. 116; 1 Salk. 6. For a plea of surname, see Archib. 46; Cro. C. C. 46, (6th Ed.)

[2] Archib. 46, 47. See 2 Stark. 704, 705, for a plea in abatement for a wrong addition, and that defendant has no addition.

[3] 1 Chitt. 452; 4 Bla. Com. 328, 329. The form and nature of these pleas are stated in 1 Chitt. 452, to which, together with the authorities there quoted, the reader is referred.

Plea of Auterfois Acquit.[1]

And the said A. B. in his proper person comes into Court here, and having heard the said indictment read, saith, that the Commonwealth ought not further to prosecute the said indictment against him the said A. B., because he saith, that heretofore, to wit, at the Supreme Judicial Court, holden at &c., [*here recite the record of the former judgment and acquittal, verbatim, from the beginning to the conclusion of it; then proceed thus,*] as by the record thereof more fully and at large appears; which said judgment still remains in full force and effect. And the said A. B. avers, and in fact saith, that he the said A. B., and the said A. B so indicted and acquitted as aforesaid, are one and the same person, and not other and different persons; and that the (felony or larceny) of which the said A. B. was indicted and acquitted as aforesaid, and the (felony or larceny) of which the said A. B. is now indicted, are one and the same, and not different (felonies or larcenies;) and this the said A. B. is ready to verify; wherefore he prays judgment, and that he may be dismissed and discharged, by the Court here, from the premises in the present indictment specified.

Plea of Auterfois Convict.

And the said A. B. in his proper person comes into Court here, and having heard the said indictment read to him, saith, that the Commonwealth ought not further to prosecute the said indictment against him the said A. B., because he saith, that heretofore, to wit, at the Supreme Judicial Court, holden &c., [*here recite the record of the former judgment and conviction verbatim; then proceed as follows,*] as by the record thereof more fully and at large appears; which said judgment still remains in full force and effect. And the said A. B. avers, that he the said A. B., and the said A. B. so indicted and convicted as last aforesaid, are one and the same person, and not other or different; and that the offence (felony or larceny) of which he the said A. B. was so indicted and convicted as aforesaid, and the offence (felony or larceny) of which he is now indicted, are one and the same, and not different offences, (felonies or larcenies;] and this the said A. B. is ready to verify; wherefore he

[1] This plea is taken from Archb. 52, 53.

prays judgment, and that he may be discharged and dismissed by the court here from the premises in the present indictment specified.

Demurrer to an Indictment.

And the said A. B., in his own proper person, comes into Court here, and having heard the said indictment read, saith, that the said indictment, and the matters and things therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law; and that he the said A. B. is not bound by the laws of the land to make answer to the same; and this he is ready to verify; wherefore, for want of a sufficient indictment in this behalf, the said A. B. prays judgment, and that he may, by the Court here, be dismissed and discharged from the premises in the said indictment specified.

Joinder in Demurrer.

And C. D., Attorney General, &c., who prosecutes in this case for the Commonwealth, saith, that the said indictment, and the matters and things therein contained, in manner and form as therein stated and set forth, are sufficient in law to compel the said A. B. to answer the same; and this the said C. D., who prosecutes as aforesaid, is ready to verify and prove, as the Court here shall direct and award.

Wherefore, inasmuch as the said A. B. hath not answered to the said indictment, nor in any manner denied the same, the said C. D., for the said Commonwealth, prays judgment; and that the said A. B. may be convicted of the premises in the said indictment specified.[1]

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[1] This demurrer and joinder are taken from Archib. 56. See remarks there upon the effect of the demurrer, and the authorities there quoted, *viz.*, 1 Saunders, 285, note (5); 1 T. R. 316.

PLEA OF PARDON.

A. B., of &c., comes here into Court, in his proper person, and states to the Court, that at the Supreme Judicial Court holden at [*here set forth the indictment and proceedings upon which he was convicted :*] and now the said A. B. comes into Court, and by the said Court is asked if he hath any thing to say why judgment and sentence should not pass against him upon the said indictment; who thereupon saith, that after the conviction of him the said A. B. of the crime aforesaid, in manner aforesaid, as in the said plea is mentioned, to wit, on a free pardon of the said crime set forth in said indictment was granted to him by his Excellency Levi Lincoln, Governor of the said Commonwealth, as appears by the said charter of pardon, under the great seal of said Commonwealth, bearing date the day of and which the said A. B. has here ready in Court to be produced. Wherefore, by reason of the said pardon, the said A. B. prays, that by the Court here, he may be dismissed and discharged from the premises in the said indictment specified.

Note. It is remarkable that there are so few regular precedents for a plea of pardon, in the modern compilations of precedents in the English books. There is one in Rastall's Entries, p. 455, from which a precedent might be extracted; but in its present state it is obsolete. There is another in Gude's Practice, vol. ii. p. 618, which may be more easily adapted to the form which modern improvements require.

The foregoing precedent is substantially conformable to the plea of pardon in the case of *Rex* v. *Hampden*, reported in 1 Trem. P. C. 308, 311. The judgment in that case is *unutterably revolting*, and ought not to stain the records of any Christian country.

The plea of pardon must set out the pardon at large, with a profert, and must allege it to be under the seal of the government. Archb. 54; 1 B. & P. 199.

If there be any variance in the description of the offence or party, between the pardon and the indictment, it may be made

good by averments of identity, in the same manner as in the plea of *auterfois acquit*. Archib. 54; Bac. Abr. *Pardon*, G. 2; 1 Chitt. 468.

In England, a pardon may be granted either before or after conviction. But in Massachusetts, this can only be done *after conviction*. The constitution of that State, chap. 2, art. 8, provides, that "no charter of pardon granted *before conviction* shall avail the party pleading the same, notwithstanding any particular or general expressions contained therein, descriptive of the offence or offences intended to be pardoned."

There is an "ancient custom" in England of *giving gloves* to the judges and their officers, which is compounded for by a fee of four guineas to each of the judges; *and upon which they may insist, before they allow a pardon!* Hawk. b. 2, c. 37, § 71; 1 Sid. 452; Kel. 25; Bac. Abr. *Pardon*, G. 2. As strange as it may seem, this "ancient custom" is stated in black and white in Hawkins, Bacon's Abr., and several other authorities. How can a judge in any country refuse to allow a pardon which has been granted by the supreme authority of the State, constitutionally exercised? If persisted in, it would be a direct act of disobedience to such authority; and upon a principle equally rational, legal, and constitutional, the king might reverse a judgment, by his own decree, of the highest judicial tribunal in his kingdom.

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CERTIORARI.

To the Court of Common Pleas.[1]

Commonwealth of Massachusetts.

Suffolk ss. To our Justices of our Court of Common Pleas, in our county of Suffolk. Greeting.

We being willing, for certain causes, to be certified of the proceedings in a certain prosecution [*here insert the indictment and process,*] and the judgment and sentence thereon had and given, command you, that the proceedings in the indictment and prosecution aforesaid, and the sentence thereon, with all things touching the same, fully and entirely as the same remain before you, by whatsoever name or names the party defendant may be called therein, to send to our Supreme Judicial Court, to be holden at B., in and for our said county of S., on the under your hands and seals, together with this writ; that we may further cause to be done thereupon, what of right and according to law, ought to be done.

Witness, L. S., Esq., at said B., the day of in the year of our Lord one thousand eight hundred and

J. C., *Clerk.*

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[1] A writ of *certiorari* is an original writ, issuing from the Supreme Judicial Court, in the name of the Commonwealth, to the judges and officers of inferior courts, commanding them to return the records of a cause depending before them, in order that the party may have more sure and speedy justice. 1 Chitt. 371; Bac. Abr. *Certiorari*, A, and other authorities there referred to.

It is left to the discretion of the Court either to deny or grant a certiorari at the prayer of an individual. In the case of an individual, there must be special ground laid to induce the court to grant it.

But the right to it is said to be absolute when prosecuted by the Attorney General, *ex officio*, on behalf of the government; and when prosecuted by a private person, in the name of the government, it also issues, unless sufficient cause is shown against it. Hawk. b. 2, c. 27, § 27, note (2); 4 Burr. 2458; Strange, 583, 549.

WRIT OF ERROR.

Writ of Error (coram nobis) in a criminal Case, where Judgment had been rendered in the Supreme Judicial Court.[1]

Commonwealth of Massachusetts.

Suffolk ss. To our Justices of our Supreme Judicial Court, Greeting.

Because in the record and proceedings, and also in the rendition of judgment on an indictment against A. B., of   for a misdemeanor, [*here insert the indictment and case complained of,*] as it is said, manifest error hath happened ; to the great damage of him the said A. B., as by his complaint we are informed : We, willing that the error, if any there has been, should be duly corrected, and full and speedy justice done therein, command you, that the records and proceedings aforesaid, which now remain before you, as it is said, you cause to be done, to correct that error, what of right and according to law shall be to be done.

Witness, L. S., Esq., at B., the   day of   in the year of &c.

J. C., *Clerk.*

Assignment of Errors.

And now the said A. B., on   at the same term, comes in the proper person of him the said A. B., and saith, that in the record and process aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, [*here assign the errors ;*] whereas [*here state the cause of the error :*] wherefore he the said A. B. prays judgment, and that the judgment aforesaid, for the errors aforesaid, and others in the record and pro-

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[1] A writ of error is, in this country, considered a writ of right. But it is said in the English authorities, that it cannot issue, even with probable cause, without the *fiat* of the Attorney General, or an express warrant from the king. 4 Burr. 2550; 2 Hawk. c. 50, § 12; 1 Stark. Cr. Pl. 352. But it is remarked by Burr. & Stark. on the pages above quoted, that when the offence is of an inferior nature, and there is probable cause, this writ is grantable of right, and not merely *ex gratia*. It is difficult to conceive, that in a country of laws, the same right can be granted to one citizen and withheld from another. Upon the foregoing principle, however erroneous a judgment may be, it cannot be corrected but by the *fiat* of the Attorney General, or by warrant from the king.

cess aforesaid appearing, being found, may be reversed, annulled, and held as entirely void; and that the said A. B. may be restored to all things which he has lost, by occasion of the judgment aforesaid, and that, as well from said conviction as of the indictment aforesaid, he may be dismissed and discharged.

WRITS OF HABEAS CORPUS.

Writ of Habeas Corpus, ad Subjiciandum.[1]

Commonwealth of Massachusetts.

Suffolk ss. To Greeting.

We command you, that the body of A. B., of in our prison, under your custody, [*or by you imprisoned and restrained of his liberty, as the case may be,*] as it is said, together with the day and cause of his taking and detaining, by whatsoever name the said A. B. shall be called or charged, you have before our Justices of our Supreme Judicial Court, holden at B., within and for the county of S., immediately after the receipt of this writ; to do and receive what our said justices shall then and there consider concerning him, in this behalf. And have you there this writ.
Witness, W. C., Esq., at B., this day of in the year of our Lord &c.

Clerk.

Habeas Corpus, ad Testificandum.[2]

Commonwealth of Massachusetts.

Suffolk ss. To the Sheriff of our county of and to the under-keeper of our gaol in said county, Greeting.

We command you that the body of A. B., detained in our prison under your custody, as it is said, by whatsoever name the

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[1] Statute of Massachusetts of 1784, c. 72.

[2] Habeas corpus, *ad deliberandum et recipiendum*, to remove a prisoner into the county for trial, where the crime was committed. See 1 Chitt. 132. No precedent for this writ is found either in Chitty, Starkie, or Tremaine.

said A. B. shall be called, you have, under safe and secure conduct, before our justices of our Supreme Judicial Court, holden at within and for the said county of immediately upon the receipt of this writ; to testify in a certain cause depending in our said Court, and then and there to be heard, between the said Commonwealth and one C. D.; and that immediately after the said A. B. shall then and there have given his testimony before our said justices, that you return him the said A. B. to our said prison, under safe and secure conduct. Hereof fail not; and have there this writ. Witness, L. S., Esq., at the day of in the year of our Lord one thousand eight hundred and .

J. C., *Clerk*.

END OF THE PRECEDENTS.

APPENDIX NOTES.

Formerly all indictments were in Latin, but now they are in English, in England as well as in this country; that they should be in a language capable of being understood by those whose lives and liberties may be affected by them.

Figures to express words are not allowable in an indictment; but numbers must be expressed in words. Forgery is an exception, when a *fac simile* of the instrument forged is given in the indictment.

An indictment for an offence created by a statute, must, by *express words*, bring the offence within the description used in the statute.

If a statute prohibit an act, and by a substantive clause, gives a recovery by action of debt, bill, plaint, or information, but mentions no indictment, the party may be indicted upon the prohibitory clause. 2 H. H., 171.

If the offence be at common law, judgment may be given as an offence at common law, though the indictment concludes *contra formam statuti;* for this conclusion may be rejected as surplusage. 2 Hawk. c. 25, § 116; 5 T. R. 162; *Commonwealth* v. *Hoxey*, 16 Mass. R. 385; *Commonwealth* v. *Boynton*, 2 Mass. R. 77.

If there be several offenders that commit the same offence, though in law they are several offences in relation to the *several offenders*, yet they may be joined in one indictment. 2 H. H. 173.

As to the name and addition of the party, if he be indicted by a wrong name or addition, and he plead to that indictment *not guilty*, or answer to it by that name, he shall not be allowed afterwards to plead a *misnomer*, or falsify the addition; for he is concluded by his plea by that name. 2 H. H. 175.

If there be no addition, yet if the party appears and pleads not guilty, without taking advantage of it, he shall not stop his trial or judgment; for by such appearance the indictment is affirmed.

The addition ought to be to the *substantive name*, not to the *alias dictus*.

But in an indictment for felony (murder), there must be "then and there" to the stroke, or to the robbery; for the day and place of the assault are not sufficient. It is usual, therefore, to repeat the "then and there" in the several parts of the act. 2 H. H. 178.

A *mistake* in not laying the offence on the very same day on which it was afterwards proved on the trial, is not material upon evidence. 2 Hawk. 236, (6th Ed.); 2 H. P. C. 179.

A *mistake in the place* in which an offence is alleged to be committed, will not be material upon evidence, or not guilty pleaded, if the fact be proved in some other place in the same county. 2 Hawk. 237, (6th Ed.) 337, (7th Ed.)

The *name* of the person upon whom the offence is committed. An indictment for murder "of a certain person to the jurors aforesaid unknown," is good; and so for stealing goods "of a person unknown." 2 H. H. 181.

There is no need of an addition of the person murdered or robbed, unless there be a plurality of persons of the same name, in the same indictment. 2 H. H. 181.

The number and value of the things stolen, must be set down in the indictment. 2 H. H. 183.

An indictment against a person for that *he did feloniously lead away a horse*, without saying "take," is not good.

The *value of the weapon* or *deodand* need not be alleged. This ancient doctrine is exploded by Foster and others.

The *indictment* must show in what part of the body the wound was given.

It is *not* necessary to allege that the party "was in the peace of the Commonwealth." Foster, 351.

The *length* and *depth* of the wound should be described.

It *is* necessary to allege that the party died of the wounds given. See the conclusions in the indictments for murder in the preceding collection of precedents.

Joinder of offences. It is no objection to the indictment that the punishment for one of the offences is positive, and for the other discretionary. *Rex* v. *Darley*, 4 East Rep. 174.

False pretences, &c. Any material variance between the pretence alleged and proved, will vitiate the indictment; as, where the indictment averred, that the defendant pretended that he had paid a sum of money into a bank; and in evidence it appeared that he had merely pretended that the money had been paid into the bank. *Rex* v. *Plestow*, 1 Camp. 194.

Perjury. Assignment of Perjury. The indictment will be supported on motion in arrest of judgment, if any one assignment of perjury be good, though the rest are vicious. *Rex* v. *Rhodes*, 2 Lord Raym. 886.

Ownership. If a feme sole be robbed, and marry before an indictment is found, the ownership should be described by her maiden name. Leach, 606.

The court can only take notice of misrecitals of a private act or statute, where *nul tiel record* is pleaded. 1 Lev. 206; Doug. 97; 1 Lord Raym. 318; 1 Salk. 330.

Strictness and certainty required in indictments. The application of this rule has often been regretted by the ablest judges. Lord *Hale* observed, that the strictness required in indictments was grown to be a blemish and inconvenience to the law, and the administration thereof; that more offenders escape by the over easy ear given to exceptions to indictments, than by the manifestation of their innocence; and that the grossest crimes had gone unpunished by reason of these unseemly niceties. 2 Hale, 193. This opinion has been confirmed by Lord *Kenyon*, 1 East,

314; Lord *Ellenborough*, 5 East, 260, and 2 M. & S. 386. And Lord *Mansfield* has declared his opinion, that it was almost as bad to let a crime go unpunished, as to permit an innocent man to suffer. 1 Leach, 383; 1 Chitt. 170, 171.

An indictment, charging a defendant with stealing "a bank note of the value of ten dollars," is good; as the term "bank note" necessarily implies a note for the payment of money. 1 Mass. R. 340.

In an indictment for forging a bill of exchange, it is not necessary to insert the marks, letters, or figures used in the margin of the bill for ornament, or the more easy detection of forgeries; as such marks or ciphers form no part of the bill. 3 Johns. Cases, 299; also, 1 Mass. R. 62, 208.

When an instrument is set forth with the word "tenor," there must be no variance between the instrument set forth, and that given in evidence; because *identity* is intended by the term. 3 Salk. 225; 2 Leach, 661; 1 Chitt. 175.

The word *purport* may be adopted instead of *tenor*. 2 East P. C. 983; Doug. 300.

An indictment must not contain abbreviations or figures. But to this rule there is an exception in the case of forgery, where a *fac simile* of the instrument forged must be given in the indictment. 1 Chitt. 176; 2 Hale, 170; Cr. C. C. 33.

Another rule in the mode of stating the offence is, that it must not be in the *disjunctive*. 1 Chitt. 236; Hawk. b. 2, c. 25, § 57; Bac. Abr. *Indictment*, G. 3. As where the indictment stated that the prisoner murdered, *or* caused to be murdered. This is bad, because uncertain.

Mere clerical or grammatical errors will not vitiate, unless they change the word, or render the meaning obscure. 1 Chitt. 239; 5 T. R. 317, 318.

Technical language of the indictment. Some terms are so appropriated, that none other, however synonymous, are capable of doing it. While there are others, which, though usual, are not necessary to be inserted. Of the latter is the following; that the prisoner, "not having the fear of God before his eyes, but being

moved and seduced by the instigation of the devil,"[1] perpetrated the crime. There is no authority to show, that the omission of them would be material. 1 Chitt. 239, 240; 6 East, 472, 473, 474.

The words, "by force and arms," were necessary at common law, in indictments for offences, amounting to an actual disturbance of the peace. But these words are clearly superfluous, even where the crime is of a forcible nature. 1 Stark. 85; 2 Lev. 221; P. Williams, 497.

In the *conclusion* of the indictment, or the several counts, there are sentences in common use, which are not at all necessary. Of this description are, "to the great damage" of the party; "to the evil example of all others in the like case offending;" and "to the great displeasure of Almighty God." 1 Chitt. 245; 2 Ld. Raym. 1462.

Against the peace. Every indictment must conclude against the peace of the government under which the prosecution takes place; as, "against the peace of said Commonwealth;" "against the peace of the United States of America;" "against the peace of the people of New York," &c.

The words, *against the dignity*, are immaterial. 1 Chitt. 248; 2 Hale, 188; Hawk. b. 2, c. 25, § 94; Cr. C. C. 43.

Joinder of several offences. In cases of felony, no more than one distinct offence at one time should be charged upon the prisoner in one indictment. But this is matter of prudence. For, in point of law, there is no objection to the insertion of several distinct felonies of the same degree in the same indictment, against the same person. 1 Chitt. 253; 2 Hale, 173; 2 Leach, 1103.

This course ought to be confined to cases, where the different offences were committed at the same time, and might constitute but one offence. 1 Chitt. 253; 2 East P. C. 935, 936; as where several forged receipts or bank notes were uttered at the same time.

There is no necessity of reciting a public statute in an indictment; for the judges are bound, *ex officio*, to take notice of all

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[1] There is not a precedent in this volume which is rendered ludicrous by the insertion of this phrase.

public statutes. 1 Chitt. 276, 277. But the parts of a private act, upon which an indictment is framed, must be set out specially, the same as other facts, and a variance will be fatal. 1 Chitt. 277; 2 Hale, 172; Hawk. b. 2, c. 25, § 103.

Amendmend of Indictments. Indictments cannot be amended, but by the concurrence of the grand jury. And it is a common practice in England for the grand jury to consent, that the court shall amend all matters of form, altering no matter of substance. Cro. C. C. 44; Hawk. b. 2, c. 25, § 98; Bac. Abr. *Indictment*, H. 11.

Habeas Corpus. Although this writ is demandable of right, it does not issue as a mere matter of course, but must be obtained by motion to the court in term time, and by application to a judge in vacation. 1 Chitt. 124; 3 Bl. Com. 132; Bac. Abr. *Habeas Corpus*, B. 5.

The Supreme Court of the United States has power, under the constitution and laws, to issue a *habeas corpus*. *Ex parte Burford*, 3 Cranch, 448. They have power to issue a *habeas corpus, ad subjiciandum*, under the statute of the United States, but have no common law power for that purpose. *Ex parte Bolman and Swartout*, 4 Cranch, 75.

In *Pennsylvania* a penalty of £300 is imposed upon any judge who shall refuse to award a *habeas corpus*, according to the provisions of the act of 1785. 2 Smith's Laws, 278.

In *England*, if the officer refuse to return the writ, an attachment will immediately issue. 5 T. R. 89; Bacon's Abr. *Habeas Corpus*, B. 8–12.

In *Massachusetts*, one judge of the Supreme Court, in term time, as well as in vacation, is authorized and required to award the writ of *habeas corpus*, in all cases required by the constitution and laws of the land, returnable forthwith. Stat. 1808, c. 80.

Officers refusing or neglecting to obey the writ, unless from necessity, shall forfeit to the party £100, and may be further punished for such disobedience, as for a contempt, and be compelled to obedience thereto by process of attachment. Mass. Laws, Stat. 1784, c. 72, § 7, 8.

Certiorari. The Supreme Judicial Court has a general power to correct errors in the proceedings of inferior courts, either by writ of error, or certiorari, in all cases where another remedy is not provided. *Savage* v. *Gulliver*, 4 Mass. R. 171.

Where the proceedings of the court below are, in any stage of them, different from the course of the common law, the only mode of correcting errors in them is by a writ of certiorari. *Commonwealth* v. *Ellis*, 11 Mass. R. 465; *Melvin* v. *Bridge*, 3 Mass. R. 305; 4 Mass. R. 670, &c.

As in cases or the maintenance of bastard children. *Drown* v. *Simpson*, 2 Mass. R. 445.

Proceedings before a justice to recover a fine for neglect of military duty. 4 Mass. R. 239, 376, 670; 5 Mass. R. 406.

So to correct the proceedings of the Court of Sessions, in laying out a new highway. *Commonwealth* v. *Coombs*, 2 Mass. R. 489.

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A *certiorari* to remove an indictment for a forcible entry and detainer, into the Supreme Court, is grantable of course. *The People* v. *Runkell*, 6 Johns. R. 334.

The delivery of a certiorari to a justice supersedes his powers, and renders all subsequent proceedings *coram non judice*. *Cap* v. *Shepherd*, 2 Johns. R. 27. The law is said to be the same in Pennsylvania. 1 Chit. 391, note.

Penitential confessions of an offence voluntarily made by one member of a church, to other members of the same church, may be given in evidence on an indictment for the same offence. *Commonwealth* v. *Drake*, 15 Mass. R.161.

In a libel for a divorce for the cause of adultery, the confessions of the libellee, uncorroborated by other circumstances, are not admissible to prove the fact of adultery. *Baxter* v. *Butler*, 1 Mass. R. 346; *Holland* v. *Holland*, 2 Mass. R. 154.

The *alteration of a record* may be proved *by parole evidence*, in the same manner as any other facts. *Brier* v. *Woodbury et al.*, 1 Pick. 362.

Accessories. In crimes under the degree of *felony*, there can be no accessories; but all persons concerned therein, if guilty at all, are principals. 1 Russ. 44; 1 Hale, 613.

If a statute create a felony, though it mention nothing of accessories before or after, yet virtually and consequentially, those that counsel or command the offence are accessories before the fact, and those who knowingly receive and conceal the offender, are accessories after. 1 Russ. 44; 1 Hale, 613, 614, 704.

Where a person is mortally wounded or poisoned in one county, and die thereof in another, the offender may be tried in the county where the death shall happen. *Commonwealth* v. *Parker et al.*, 2 Pick. 550.

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